Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,
v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,
v.

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Respondents.

AND RELATED CASES

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, AND SBC COMMUNICATIONS INC.

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QUESTIONS PRESENTED

1. Whether the Communications Act of 1934, as amended—which gives States sole authority to "establish" and "determine" just and reasonable rates for local interconnection arrangements (47 U.S.C. § 252(c), (d)) and which provides that "nothing in this Act shall be construed . . . to give the [Federal Communications] Commission jurisdiction" with respect to intrastate matters (*id.* § 152(b))—forecloses the FCC's assertion of preemptive jurisdiction to regulate the rates and certain other terms of local interconnection arrangements.

2. Whether FCC rules requiring incumbent telephone companies to provide their competitors with preassembled combinations of "unbundled network elements" conflict with statutory text stating that unbundled network elements need only be provided "in a manner that allows *requesting carriers* to combine such elements" (47 U.S.C. § 251(c)(3) (emphasis added)).

3. Whether FCC rules requiring incumbents to provide their competitors, in fully preassembled form and at cost-based rates, a "platform" of all the network elements needed to duplicate the incumbent's finished telecommunications service violate the wholesale pricing requirements and marketing restrictions governing a competitor's resale of the incumbent's telecommunications services (47 U.S.C. §§ 252(d)(3), 271(e)(1)).

4. Whether the FCC improperly expanded an incumbent's obligation to provide access to essential "network elements" (a) by ignoring the statute's threshold requirement that access to network elements is required only when such access is "necessary" or when the incumbent's failure to provide such access would "impair" a competitor's ability to provide service (47 U.S.C. § 251(d)(2)), and (b) by expanding the definition of "network element" (*id.* § 153(29)) to include assets extrinsic to an incum-

bent's transmission network and complete telecommunications services that incumbents offer at retail.

5. Whether FCC rules allowing a competitor to force upon an incumbent carrier any isolated provision from any of the incumbent's approved interconnection agreements conflicts with the Act's reliance on private negotiations and binding agreements and with statutory text providing that an incumbent carrier must make such provisions available to other carriers only "upon the same terms and conditions" as in the original agreement (47 U.S.C. § 252(i)).

LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Corporation, and Bell Atlantic Global Funding Corporation. In addition Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company, Anderson Cellular Telephone Company, Las Cruces Cellular Telephone Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Bell Atlantic Information Services Hellas S.A., Polskie Ksiazki Telefoniczne Sp. z o. o., Nord Trans Biuro Reklam Sp. z o. o., NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

BellSouth Corporation has no parent companies. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, BellSouth New Zealand, Compania de Radiocomunicaciones Moviles S.A., Telcel Celular C.A., Tele 2000, S.A., BellSouth Wireless Data, L.P., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data C.V., BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS in NC & SC), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Jacksonville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Memphis SMSA Limited Partnership, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, Tennessee RSA Limited Partnership, and Terre Haute Cellular Telephone Company, Inc.

SBC Communications Inc., which has shares outstanding in the hands of the public, is the parent company of Southwestern Bell Telephone Company and Southwestern Bell Yellow Pages, Inc. SBC Communications Inc. has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco, Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited

Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV) Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

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STATEMENT OF THE CASE

This case presents two sets of questions triggered by the FCC's misguided attempt to reconfigure the Telecommunications Act of 1996 (the "1996 Act").[1]

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[1] Relevant provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, are set forth in the addendum to this brief.

First, breaching a 60-year old statutory barrier that Congress had purposely left in place, the Commission asserted authority to superintend nearly every aspect of competition in local telephone markets—including, in particular, the prices that incumbent local carriers may charge their competitors for access to local networks. The FCC made that unprecedented claim despite Congress's express directive that "State commissions," not the FCC, shall "establish" and "determine" the relevant prices according to standards set forth in the 1996 Act itself (47 U.S.C. § 252(c) and (d)); despite the FCC's frank admission that the new statute "do[es] not contain an explicit grant of intrastate authority to the Commission" (J.A. 448 (¶ 84)); and despite the deeply rooted principle that only the most direct and unambiguous statutory language can override the Communications Act's express prohibition against any such FCC assertion of intrastate jurisdiction.

Second, the FCC's substantive rules effectively nullified the Act's fundamental distinction between two discrete paths by which a competitor may enter local service: leasing unbundled portions of an incumbent carrier's local network at cost-based rates, and purchasing for resale a finished telecommunications service at the incumbent's retail rate less a wholesale discount. The FCC sanctioned a scheme of sham unbundling, under which a competitor could purchase a finished service for resale, *not* at the wholesale discount specified in the Act, but at the cost-based price reserved for unbundled network elements. The competitor could do so merely by relabeling its request for the incumbent's finished service as a request for a fully preassembled package of all the elements of an incumbent's network needed to provide the identical finished service that the incumbent itself provides. That result not only destroyed the statutory distinction between resale and unbundled network elements, but also subverted the important goal of preserving universal telephone service. Regulators require incumbent carriers to keep their

rates for local residential service artificially low and allow them to recover their losses elsewhere. If new entrants could obtain at cost-based rates the services that incumbents necessarily provide above cost, they could cherry-pick the incumbent's profitable customers, leaving the incumbent with no way to recover its losses on basic residential service.

1. Background. For over 60 years, since the enactment of the Communications Act of 1934, Congress has expressly confined the FCC's jurisdiction to interstate and foreign communications and has reserved for the States exclusive jurisdiction over intrastate communications. Section 2(b) of the Act provides (with exceptions not relevant here) that "*nothing* in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b) (emphasis added). This Court has squarely held that section 2(b) "fence[s] off from FCC reach or regulation intrastate matters," and that only an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the FCC can "override the command of [§ 2(b)]." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 377 (1986).

Until recently, most States exercised their federally guaranteed authority over local telephone service by granting exclusive franchises in each local service area and pervasively regulating these franchised "local exchange carriers" (or "LECs") with an eye to securing affordable "universal service." To keep prices low even for high-cost customers, the States mandated an extensive system of interservice subsidies under which LECs were typically required to charge below-cost rates for basic residential service and above-cost rates for business and other services. The level and structure of these subsidies naturally varied throughout the country depending on each State's local conditions and prevailing social policies.

Interservice subsidy arrangements were economically sustainable only because the States preserved certain legal barriers to entry that prevented competitors from cherry-picking LEC business customers whose above-cost rates fund universal service. In the years leading up to the 1996 Act, however, a number of States began to depart from the exclusive franchise model. These States took the lead in the difficult and inherently localized process of opening up local telephone markets to competition while still ensuring affordable, high-quality service to all consumers. *See* J.A. 241 (*Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 427 n.7 (8th Cir. 1996)).

2. The 1996 Act. Building significantly on the work already done by the States, Congress crafted in the 1996 Act a "pro-competitive, de-regulatory national policy framework" designed to "open[] all telecommunications markets to competition." S. Conf. Rep. No. 104-230, at 113 (1996) ("Conf. Rep."). With respect to local service markets, Congress expressly preempted all State and local legal barriers to entry, such as exclusive franchises. *See* 47 U.S.C. § 253(a).

Congress also imposed on incumbent local exchange carriers several affirmative duties. First, an incumbent carrier must allow competitors to interconnect with the incumbent's network in order to complete calls to and from that network. *Id.* § 251(c)(2). Second, an incumbent must sell competitors access to "network elements" on an "unbundled basis"—that is, allow competitors to supplement their own network facilities by leasing individual pieces of "equipment" or a "facility" from the incumbent's transmission network. *Id.* § 251(c)(3); *see also id.* §153(29). Third, an incumbent must sell competitors its retail telephone services at wholesale prices so that competitors can resell those complete, finished services to their own customers. *Id.* § 251(c)(4). These duties ensure that, instead of having to build a complete network from scratch before entering the local market, a com-

petitor will be able to enter gradually by leasing individual facilities to fill in gaps in its own network or by reselling the incumbent's existing services.

Recognizing, however, that these steps implicated the intensely local concerns of 50 different jurisdictions—each with its own system of rate structures, regulations, and subsidies—Congress enlisted the State public utility commissions to ensure that local competition would be implemented fairly and with due regard to local conditions. In keeping with its deregulatory purposes, Congress chose to rely in the first instance on private party negotiations to reach interconnection agreements consistent with the 1996 Act.[3] But where the parties cannot agree on all issues within a prescribed bargaining period, Congress provided that either party may petition the State commission "to arbitrate any open issues." 47 U.S.C. § 252(b)(1). Most significantly for present purposes, the Act entrusts solely to State commissions the resolution of disputes concerning the crucial question of pricing. It provides that "*a State commission* shall . . . establish any rates for interconnection, services, or network elements," in accordance with the pricing standards spelled out in the statute. *Id.* § 252(c)(2) (emphasis added); *see also id.* § 252(d)(1) (specifying that "a State commission" shall "determin[e]" just and reasonable rates).

Congress provided for ultimate federal oversight of State arbitrations, but it chose a judicial, not an administrative, mechanism for this oversight. Once an arbitrated agreement has been finally approved by a State commission, any aggrieved party may bring an action in federal district court to determine whether the decision

[3] Incumbent carriers have signed more than 2,400 voluntary agreements with 280 local service competitors. *See* Roy Neel, President, United States Telephone Association, En Banc Presentation on Local Competition before the FCC, Jan. 29, 1998; USTA Competition Report (Nov. 3, 1997).

"meets the requirements of section 251 . . . and [section 252]." *Id.* § 252(e)(6).

In contrast to its broad reliance on private negotiations, State-supervised arbitrations, and federal judicial review, Congress assigned the FCC a limited role under the Act's local competition provisions. The statute provides that, if a State commission actually declines to carry out its responsibilities under section 252, the FCC "shall assume the responsibility of the State commission . . . with respect to the proceeding or matter." *Id.* § 252(e)(5). Otherwise, with a few specifically stated exceptions,[8] Congress scrupulously avoided authorizing the FCC to intrude on the States' jurisdiction to oversee intrastate telephone service. In particular, while directing the FCC to issue within six months regulations implementing the provisions for which it was assigned specific responsibility (*id.* § 251(d)(1)), Congress gave the FCC *no* role with respect to the pricing of interconnection arrangements.

3. The FCC's Order. Unwilling to accept its circumscribed role under the new statute, the FCC moved aggressively to transform the deregulatory, State-centered plan Congress enacted into a massive new federal regulatory program. In its First Report and Order—a 700-page, 3,200-footnote opus—the Commission undertook to promulgate "uniform, national rules" addressing every conceivable local interconnection issue (J.A. 431 (¶ 53)), and it declared those rules "binding on the states, even with respect to intrastate issues" (*id.* at 455 (¶ 101)).

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[8] For example, Congress gave the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering," including the responsibility to make numbers available "on an equitable basis." 47 U.S.C. § 251(e)(1). It also gave the FCC a role in defining a carrier's duty to provide "number portability" (*id.* § 251(b)(2)); in determining what network elements should be unbundled (*id.* § 251(d)(2)); in prescribing permissible resale restrictions (*id.* § 251(c)(4)(B)); and in providing for the treatment of comparable carriers as "incumbents" (*id.* § 251(h)(2)).

Although the FCC conceded that the 1996 Act "do[es] not contain an explicit grant of intrastate authority to the Commission" (*id.* at 448 (¶ 84)), it nevertheless proclaimed that it had authority "without limitation" (*id.* at 463-64 (¶ 115)) to issue such binding rules because, in its view, the "1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act" (*id.* at 417 (¶ 24)). As the FCC's Chairman declared in plainer terms, the 1996 Act threw the States' traditional intrastate authority into "the trash can of history." [4]

Having asserted unconstrained intrastate authority, the FCC turned its attention to the pricing of local interconnection arrangements. Even though section 252(d) expressly assigns to "State commission[s]" the authority to determine "just and reasonable" rates, the FCC declared that Congress intended the *federal* agency to take the lead role in implementing the statutory pricing provisions. Divining a jurisdictional dichotomy nowhere expressed in the statutory text, the Commission asserted jurisdiction to adopt "national pricing rules" and to relegate the States to the subordinate and largely ministerial role of mechanically applying those rules. J.A. 448-49, 461-62 (¶¶ 85, 111).

In particular, the Commission mandated a new pricing methodology known as "total element long run incremental cost" (or "TELRIC"), which required States to set prices based solely on the incremental, forward-looking cost of an ideally efficient network—a hypothetical network that, by design, ignored nearly every aspect of an incumbent's actual current "cost . . . of providing the interconnection or network element" (47 U.S.C. § 252(d)(1)). *See* J.A. 419 (¶ 29). The FCC then defined in elaborate detail the steps that State commissions must take

[4] *Hundt Looks toward 'Radical' Overhaul of Regulatory Regimes, Major Business Moves*, Telecommunications Reports, at 6 (July 15, 1996).

to adhere to the TELRIC standard. *See, e.g.*, J.A. 751-69 (¶¶ 672-715); 47 C.F.R. §§ 51.501 *et seq.* The Commission further specified the result that States must reach as to every other pricing issue of consequence, from the extent of geographical rate "deaveraging" (at least three different rate zones in each State) to the appropriate divisions between recurring and non-recurring charges. *See* 47 C.F.R. §§ 51.505(b)(3), 51.507(f). The FCC even ordered each State to apply specific FCC-prescribed rates (known as "proxy" prices) until the State could conduct a detailed cost study in compliance with the FCC's newly minted TELRIC methodology. J.A. 419, 790-91 (¶¶ 29, 767-770).[5]

In addition to these intricate pricing rules, the FCC's First Report and Order also contained lengthy and detailed regulations governing non-pricing aspects of the 1996 Act. Of particular importance here, the FCC's order completely dismantled the statute's distinction between access to an incumbent carrier's unbundled network elements—which must be priced at "cost" plus "a reasonable profit" (47 U.S.C. § 252(d)(1))—and the provision of finished services for resale—which must be priced at the incumbent's "retail rates" less "avoided" costs (*id.* § 252(d)(3)). Because States have set above-cost rates for business and advanced services to fund affordable, below-cost service for basic residential service, the retail-less-avoided-cost standard of section 252(d)(3) ensures that the wholesale price paid by a resale competitor reflects the same contribution toward the cost of providing universal service that is contained in

[5] In a separate order in the same proceeding (J.A. 1161-357 (Second Report and Order)), the FCC also asserted power to dictate to the States the terms and conditions for implementing intrastate "toll" (*i.e.*, short-haul long-distance) "dialing parity"—a system that allows callers to choose a carrier other than their local telephone company for such service without dialing extra digits. *See* 47 U.S.C. §§ 153(15), 251(b)(3). The FCC asserted this power even though Congress directed the States, not the FCC, to implement dialing parity for such intrastate calls. *See id.* § 271(e)(2)(B).

the incumbent's retail rates.[6] By contrast, because regulators generally have refused to consider these interservice subsidies as part of the "cost" of unbundled network elements under section 252(d)(1), the actual prices for network elements provide no support for universal service.

The Commission nonetheless ruled that a competitor could purchase at cost-based rates *all* the elements needed to provide a complete service. And despite the statute's express statement that incumbents need provide access only "in a manner that allows *requesting carriers* to combine such elements" (47 U.S.C. § 251(c)(3) (emphasis added)), the Commission ruled that a competitor could even require the incumbent to provide those elements in *pre-combined, fully bundled form.* J.A. 551-54, 571-76 (¶¶ 292-297, 328-340). The FCC's rules therefore allowed a competitor to obtain a finished service at cost-based, unbundled element rates—thereby negating the statutory pricing structure—merely by framing its request in different terms: instead of requesting the incumbent's retail service for resale at a wholesale discount off the regulated retail rate, the competitor could simply demand, in fully preassembled form and at cost-based prices, all the supposedly "unbundled" network elements needed to provide that same retail service.

The FCC exacerbated the problem by twisting the definition of "network elements" beyond all recognition. In the Commission's view, an incumbent must provide its competitors with access, not only to the essential physical facilities that a competitor might need to fill out its own local network, but also to essentially *all* of the incumbent's assets and operations, including even its back-office support systems and live operators—hardly "network elements" in any common understanding of that term. J.A.

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[6] *See* H.R. Rep. No. 104-204, at 72 (1995) (in recognition of the "pricing structures for telephone exchange service in the State," the resale rate "should reflect whether, and to what extent, the local dialtone service is subsidized by other services").

670, 679-80 (¶¶ 516, 536). The FCC also swept within its definition of unbundled network elements such optional retail services as Caller ID and Call Waiting, which provide significant universal service contributions. Under the Commission's rules they, too, must be offered to competitors at cost-based rates. *See* J.A. 538-39, 612 (¶¶ 263, 413).

In the process, the Commission essentially read out of the statute a restrictive provision directing the FCC to consider, in determining what network elements must be made available, whether lack of access to a particular element would "impair" a competitor's ability to provide telecommunications services and, in the case of proprietary elements, whether such access is "necessary." 47 U.S.C. § 251(d)(2). In the Commission's view, the "necessary" and "impair" standards have nothing to do with whether a requesting carrier can "obtain an element from a source other than the incumbent"; instead, an element qualifies under both standards unless a requesting carrier can offer the same service using other "elements *within an incumbent LEC's network,*" without experiencing any decrease in quality or increase in cost. J.A. 547, 548, 549 (¶¶ 283, 285, 287) (emphasis added).

Finally, the FCC transformed the 1996 Act's unexceptional most-favored-nation requirement—under which an incumbent must make available to requesting carriers, "upon the same terms and conditions," any interconnection arrangement contained in an approved agreement (47 U.S.C. § 252(i))—into an extreme "pick-and-choose" rule that subverts voluntary negotiations and undermines binding agreements. Under the FCC's order, a competitor may pluck any isolated provision from an approved agreement and force it upon the incumbent carrier without accepting the other "terms and conditions" negotiated as part of the same agreement. J.A. 1044-46 (¶¶ 1309-1315). A competitor may even unilaterally revise a signed, State-approved agreement by "avail[ing] itself of more advantageous terms and conditions *subsequently* negotiated by

any other carrier." J.A. 1046-47 (¶ 1316) (emphasis added).

4. The Stay Proceedings. Numerous parties, including many State commissions and incumbent carriers, petitioned for review of the FCC's order. Those petitions were consolidated in the Eighth Circuit pursuant to 28 U.S.C. § 2112(a)(3).

Because the FCC's arrogation of pricing jurisdiction seemed so clearly to usurp authority that Congress granted to the States, a number of States, as well as some private petitioners, sought an interim stay of the FCC's rules pending judicial review. After full briefing and oral argument, the Eighth Circuit granted the requested stay in October 1996 because of what "appear[ed] to be the rather clear and direct indication [in the statutory text] that the state commissions"—not the FCC—"should establish prices." J.A. 236 (109 F.3d at 424).

The FCC, AT&T, and MCI filed applications to vacate the stay. Justice Thomas denied those applications. 117 S. Ct. 378; 117 S. Ct. 379 (1996). The FCC immediately reapplied to Justice Ginsburg, and AT&T and MCI reapplied to Justice Stevens. The renewed applications were referred to the full Court, which likewise denied them. 117 S. Ct. 429 (1996).

5. The Decision Below. After further briefing and oral argument, the court of appeals confirmed its earlier tentative holding that the plain language of section 252(c) and (d) "directly and straightforwardly assigns to the states the authority to set . . . prices." Pet. App. 17a. Those specific congressional directives were entirely sufficient to resolve the issue of pricing jurisdiction. The court made plain, however, that, even if there were "[a]ny ambiguity," it would be resolved against the FCC because of the jurisdictional proscription of section 2(b), as interpreted by this Court in *Louisiana PSC*. Pet. App. at 15a. As the court of appeals explained, "the prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access, and resale . . . qualify as 'charges . . . for or in connection

with intrastate communications service.'" *Id.* at 15a (quoting section 2(b)).[7]

The Eighth Circuit also addressed a lengthy series of non-jurisdictional challenges to the substance of the FCC's rules. First, the court set aside the FCC's "pick-and-choose" rule because, contrary to the Act's terms and structure, it "would thwart the negotiation process and preclude the attainment of binding negotiated agreements." Pet. App. 26a. The court then turned to the various issues concerning unbundled network elements. It denied challenges to both the FCC's all-encompassing definition of "network element[s]" and its lax understanding of the "necessary" and "impair" standards. *Id.* at 41a-45a, 47a-50a. The court ruled, however, that the FCC's attempt to collapse the fundamental statutory distinction between resale and access to unbundled elements conflicted with both the language and the structure of the Act.

In particular, the court concluded that "the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased . . . on an unbundled basis . . . cannot be squared with the terms of subsection 251(c)(3)" (*id.* at 52a), which states that "requesting carriers" are to "combine such elements" to provide telecommunications services. In light of that holding, the court concurrently rejected the incumbents' contention that new entrants cannot obtain access to all of the network elements that, when combined by the requesting carrier, are sufficient to provide service. *Id.* at 54a-58a. Because entrants must

[7] In a separate appeal that was briefed and argued independently of the main appeal and that the court decided in a separate opinion, the Eighth Circuit concluded that the FCC lacked jurisdiction to issue mandatory rules governing the States' implementation of "intraLATA toll [*i.e.*, short-haul long-distance] dialing parity." Pet. App. 81a-89a. The court of appeals relied on the express terms of section 271(e)(2)(B)—which "indicates that state commissions, not the FCC, have the authority to issue intraLATA dialing parity rules" (Pet. App. 88a)—as well as on this Court's analysis of section 2(b) in *Louisiana PSC*.

make an "up-front investment" and incur additional "costs and risks" in combining the elements themselves, the Eighth Circuit reasoned, recombining all the elements needed to provide a complete service would not simply be resale under another name. *Id.* at 56a-57a.

AT&T and others immediately sought to sidestep the Eighth Circuit's ruling on the issue of combining network elements. Citing the court's failure to vacate a particular subsection of the FCC's rules (47 C.F.R. § 51.315(b))—which provided that, "[e]xcept upon request, an incumbent [carrier] shall not separate requested network elements that the incumbent [carrier] currently combines" (Pet. App. 294a)—AT&T argued in proceedings around the country that it could still skirt the resale pricing rules by obtaining at cost-based prices a "platform" of all the necessary network elements already combined into a complete service by the incumbent.

Once it was alerted to these attempted evasions of its ruling, the Eighth Circuit granted rehearing and vacated the FCC rule at issue as inconsistent with the plain statutory text. The court stated that "§ 251(c)(3) does not permit a new entrant to purchase the incumbent [carrier's] assembled platform(s) of combined network elements"; indeed, if that were allowed, it would "obliterate the careful distinctions Congress has drawn" between resale and unbundled elements. Pet. App. 71a.

SUMMARY OF ARGUMENT

I. Despite the tortuous complexity of the FCC's regulations, the primary legal issue here is actually quite simple. At bottom, the question of pricing jurisdiction turns on the plain language of the specific statutory provisions in which Congress assigned pricing authority. Those provisions make clear that Congress intended State commissions to "establish" and "determine" rates in accordance with the pricing standards expressly laid out in the statute. 47 U.S.C. § 252(c), (d). The text of these provisions could not be clearer, and it leaves no room for the FCC's assertion of broad federal pricing authority. Simply put, Con-

gress considered this precise issue and determined that State commissions, not the FCC, should determine rates. That should be the end of the matter.

In the teeth of these directly applicable statutory provisions, the FCC claims that it has authority to issue enormously complex pricing rules that would turn State commissions into nothing more than "field agents" of the Washington bureaucracy, "sent out to execute the will of FCC officials."[8] That result simply cannot be squared with Congress's decision to assign expressly to State commissions the authority to determine rates according to the statutory standards.

Nor is it in any way supported by the ambiguous, general statutory provisions on which the FCC places exclusive reliance. Even if such general provisions could override a specific assignment of pricing jurisdiction—which they cannot—the provisions cited by the FCC have no applicability here. In particular, by its plain terms, section 251(d)(1)—on which the FCC rests most heavily—directs the agency merely to prescribe within six months whatever rules may be necessary to implement the specific requirements in *section 251* for which the FCC was given express responsibility, not the separate pricing standards in section 252 for which the States were given express responsibility. Nothing in this procedural provision confers any new substantive jurisdiction on the FCC, and certainly nothing in it can be read to override section 252's express grant of pricing jurisdiction to the States. Congress plainly knows how to give the FCC substantive jurisdiction over intrastate communications: it did precisely that in other portions of section 251, in other sections of the 1996 Act, and in the analogous Cable Act. The crucial language found in each of those provisions is altogether missing from section 251(d)(1).

Even if the Court were to find some ambiguity here, that would not change the result. Section 2(b), as a spe-

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[8] Joint Reply Brief for the State Commission Parties at 2 (8th Cir. No. 96-3321, filed Jan. 6, 1997).

cial rule of construction, reverses the usual principle of *Chevron* deference, so that any jurisdictional ambiguity is fatal to the FCC's position. As this Court explained in *Louisiana PSC*, only the most straightforward and unambiguous assignment of intrastate jurisdiction to the FCC can overcome the jurisdictional bar of section 2(b). Petitioners cannot sweep aside *Louisiana PSC* on the theory that section 251 *applies* to intrastate matters and that the FCC's jurisdiction is necessarily coextensive with the scope of the Act's provisions. As the FCC acknowledges, section 2(b) is written in the disjunctive—"nothing in this Act shall be construed to apply *or to give the Commission jurisdiction*" with respect to intrastate communications. As a result, it is not enough under section 2(b) that a provision of the Act applies to intrastate matters; the Act also must clearly and unambiguously give the FCC jurisdiction with respect to those matters. Petitioners have offered no plausible justification for ignoring the plain text of that provision.

The FCC argues that this Court should disregard section 2(b) in this case. Its theory, drawn from an "impossibility" doctrine developed by some courts of appeals, is that the local network is used for both intrastate and interstate calls, that only one regulatory authority can exercise pricing power over such indivisible facilities, and that Congress must have intended the FCC to be that regulatory authority. But the FCC relied on no such theory in its order, and for good reason: it is wrong. To begin with, most of the issues dealt with in the 1996 Act and addressed by the FCC's pricing rules are purely intrastate in nature and have no interstate component at all. Even where there is an interstate component, moreover, the settled jurisprudence is that the FCC may not preempt State price regulation merely because the same facility is used for both interstate and intrastate calls; rather, preemption is permissible only when the FCC can demonstrate with precision that State regulation negates the FCC's exercise of its own lawful interstate authority. And here, where the FCC has continued to exercise jurisdiction

over the pricing of interstate calls, the agency has not made—and cannot make—any such showing.

Finally, the FCC asks the Court to indulge the agency's attenuated jurisdictional inferences on the ground that it would be inefficient for 50 different States to apply the statute's pricing standards in disparate fashion. It claims that Congress must have expected the federal agency to issue general rules prescribing basic pricing methodologies, and must have intended the States to apply those rules in setting specific rates. But that is not what Congress said. On the contrary, Congress specifically *protected* the States' authority to issue rules implementing the Act's provisions. 47 U.S.C. § 261(b). And, in any event, the FCC's order goes far beyond the boundaries marked out by its lawyers in this Court: not only did the agency itself mandate specific "proxy" prices that States *must* apply, but also its extraordinarily detailed rules dictate specific results as to every other significant pricing matter, leaving the States with barely more than a ministerial role.

II. A number of the FCC's non-jurisdictional determinations are also incompatible with the 1996 Act. Most important, the Commission abrogated the statute's clear distinction between resale of an incumbent's finished telecommunications services and access to an incumbent's unbundled network elements. The 1996 Act permits resellers to purchase an incumbent's services only at rates based on the incumbent's retail price less any avoided costs. This pricing scheme ensures that the incumbent will continue to recover any universal service subsidy built into its retail rates; it also preserves incentives for new entrants to build facilities of their own.

The FCC's rules cut the legs out from under this statutory scheme. Those rules allow a competitor to obtain a finished service *not* at the wholesale rate required by statute, but at the cost-based rates reserved for unbundled network elements. Under the FCC's sham-unbundling theory, a reseller who wants to offer exactly the same service provided by an incumbent may freely circumvent the statutory scheme by requesting, on a fully pre-

combined and bundled basis, all of the "unbundled" network elements that the incumbent uses to provide the retail service.

That approach suffers from multiple flaws. First, the statute makes abundantly clear that unbundled elements, unlike resold services, need not be provided on a precombined basis. Congress required an incumbent to provide network elements only in a manner that allows "*requesting carriers* to combine such elements." 47 U.S.C. § 251(c)(3) (emphasis added). There is no ambiguity in that language, and it provides a complete response to the FCC's misguided attempt to require incumbents to provide pre-combined packages of elements to competitors.

Second, even if the Commission could properly ignore the terms of section 251(c)(3) and force incumbents, rather than "requesting carriers," to "combine" unbundled elements, the FCC's rules still violate the Act by allowing requesting carriers to obtain, at cost-based rates, *all* the pre-combined network elements needed to provide a service. Access to all those pre-combined elements is resale, plain and simple, and the statutory resale rules must apply if they are to have any meaning at all. Indeed, the FCC itself has recognized that this use of network elements must be distinguished from resale, and it has struggled in vain to find a substantive distinction of any significance. None exists. Further, the language of the 1996 Act expressly contemplates that a user of unbundled network elements will have a network of its own and that an incumbent will allow that user physical access to its facilities to connect the two networks. *See* 47 U.S.C. § 251(c)(2), (c)(3). Those statutory provisions would serve little purpose if access to unbundled elements were simply a way to requisition an incumbent's complete network.

The FCC also expanded beyond all recognition the statutory obligation to provide unbundled network elements. Congress directed the FCC, in determining what network elements should be made available, to consider whether the unavailability of such elements would "impair" the competitor's ability to provide service or, in the

case of proprietary elements, whether access to such elements is "necessary." 47 U.S.C. § 251(d)(2). The Commission simply read those requirements out of the 1996 Act. It determined that incumbents must allow competitors to lease their network elements even if equivalent facilities are freely available from sources other than the incumbent. That result cannot be squared with any reasonable understanding of "necessary" or "impair." Similarly, while Congress defined network elements in terms of the incumbent's "facilit[ies] or equipment" used to complete calls, the FCC expanded that rule to require incumbents to provide their competitors with assets, including their live operators, that have nothing to do with the incumbent's essential physical facilities.

III. Finally, the FCC grossly misread the Act's most-favored-nation provision in a manner that undermines Congress's reliance on private negotiations and binding agreements as the principal means of opening local telephone markets to competition. The statute provides that an incumbent must make available to a requesting carrier, "upon the *same terms and conditions*," any interconnection, service, or network element provided under a prior agreement to which the incumbent is a party. 47 U.S.C. § 252(i) (emphasis added). Under the Commission's "pick-and-choose" rule, however, a competitor may lift out of any of the incumbent's prior interconnection agreements the single term in each that is most disadvantageous to the incumbent, may leave behind the other terms and conditions in each such agreement, may stitch these unfavorable terms together, and may force the resulting agreement on the incumbent. That rule would preclude any semblance of free negotiation between incumbents and potential entrants. Any provision to which an incumbent agrees would immediately become a new high-water mark that could be selected by all other competitors—*even those who have already agreed to less favorable terms*—wholly without regard to the countervailing trade-offs embodied in the agreement as a whole. Nothing in section 252(i) can possibly be understood to justify this absurd result.

ARGUMENT

I. CONGRESS EXPRESSLY ASSIGNED PRICING JURISDICTION EXCLUSIVELY TO THE STATES AND DELIBERATELY PRESERVED THE STATUTE'S HISTORICAL PROHIBITION AGAINST FCC CLAIMS OF INTRASTATE JURISDICTION.

The FCC's jurisdictional argument is fundamentally misconceived. The agency starts from the premise that it has generic authority to implement every provision of the Communications Act, whether interstate *or* intrastate, because Congress could not possibly have enacted a statute that did not authorize FCC micro-management of every last interpretive issue. *See* FCC Br. 20-21. The agency then scours the statute looking for any general provision that could conceivably be read to support—however vaguely or inferentially—the agency's egocentric view that Congress has given it plenary authority over all intrastate matters.

But the FCC approaches the issue from precisely the wrong direction. First, contrary to the agency's argument, the strong presumption here—a presumption written into the very text of the Communications Act—is that Congress has "fence[d] off" intrastate matters "from FCC reach or regulation." *Louisiana PSC*, 476 U.S. at 370. As we discuss below, nothing in section 251(d)(1), section 201(b), or the grab-bag of other provisions on which the FCC relies overcomes that controlling principle. Even more to the point, Congress left nothing to the imagination on the crucial question of pricing jurisdiction: it *specifically* assigned that authority to the States. That express grant of authority would be decisive here even without section 2(b). In tandem with section 2(b), it provides overwhelming support for the Eighth Circuit's conclusion. Accordingly, it is with those directly relevant—indeed, dispositive—provisions that we begin.[9]

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[9] This brief focuses principally on the question of pricing authority, the lead jurisdictional issue presented in this case. The separate briefs of the Mid-Sized LECs and the United States Telephone

A. The Plain Language of the 1996 Act Grants Pricing Jurisdiction to the States.

1. There is nothing ambiguous about the 1996 Act's assignment of pricing authority. Section 252(c)(2) empowers "a State commission" to "establish any rates . . . according to subsection (d)." In turn, section 252(d), entitled "Pricing Standards," specifies that "a State commission" is to "determin[e]" the relevant rates in accordance with the standards spelled out in the Act itself. Thus, section 252(d)(1) provides that "a *State commission*" shall determine the "just and reasonable rate" for interconnection and access to network elements based on the "cost . . . of providing" the interconnection or network elements. Section 252(d)(2) provides that "a *State commission*" shall consider reciprocal compensation for the transport and termination of traffic to be "just and reasonable" only if certain criteria are satisfied. Finally, section 252(d)(3) provides that "a *State commission* shall determine wholesale rates" for resale of complete telecommunications services by deducting from the current retail rate the "costs that will be avoided" by the incumbent carrier by selling at wholesale.

For all the ink that has been spilled, the question of pricing jurisdiction is ultimately just that simple. Sections 252(c) and (d) unambiguously give State commissions the authority to determine appropriate rates pursuant to the statutory pricing standards. Congress provided the pricing rules that it wanted followed, and it entrusted State commissions with the responsibility to determine rates in accordance with those rules. That express assignment of pricing jurisdiction to State commissions resolves the primary issue in dispute here. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished").

Association expose flaws in other aspects of the FCC's jurisdictional assertions.

2. Given the lucidity of this directly relevant statutory language—and the absence of any statement in the 1996 Act suggesting that the FCC was to have a role in pricing —the FCC can defend its assertion of pricing authority only by speculating that Congress intended to divide pricing authority in a manner that is nowhere evident on the face of the statute. The FCC conjectures that, notwithstanding the plain directives of sections 252(c) and (d), Congress gave it "concurrent" jurisdiction over pricing. FCC Br. 26. In particular, the Commission asserts that Congress expected the FCC to issue pricing rules governing "general methodological issues," even if it left to the States "considerable discretion" in applying those federal rules to particular cases. FCC Br. 26; MCI Br. 30.

That argument is remarkable for several reasons. Most fundamentally, the "concurrent" jurisdictional scheme exists only in the imagination of the FCC and its supporting petitioners. Congress told the *States* to "establish" and "determine" rates according to the standards set forth in section 252(d); it did not say that the *FCC* was to take the lead role in determining prices and that the States were merely to apply FCC-derived formulas to individual cases. The responsibility to "establish" and "determine" rates, under any natural reading of those terms, encompasses more than the rote application of detailed rules formulated by a different body. It necessarily subsumes as well the authority to develop pricing methodologies sufficient to satisfy the statutory standards. And, as we explain further below, nothing in section 251(d)(1) suggests that, despite the clear directives of section 252, Congress in fact intended to subordinate the States to the federal bureaucracy on pricing matters—indeed, nothing in even the most generous reading of section 251(d)(1) gives the FCC authority over any part of section 252.

In any event, the FCC's order belies the very theory of concurrent jurisdiction that its lawyers espouse in this Court. In a portion of the order that the FCC never even mentions in its brief, the Commission prescribed a set of *specific rates* (dubbed "proxy prices"), and it purported

to *require* State commissions to apply those specific rates until they could complete detailed cost studies sufficient to satisfy the FCC's TELRIC cost standards. *See* J.A. 719, 801-04, 867-70 (¶¶ 619, 792-794, 925-932).

Even apart from these specific proxy prices, the FCC's pricing rules were far more intrusive than its brief implies. It is simply inaccurate to say, as the Commission now insists, that the agency confined itself to "general methodological rules" and allowed the States "considerable discretion" in determining actual rates. In fact, the FCC promulgated detailed pricing standards that covered every rate issue of significance and that consigned the States to a subordinate role consisting largely of plugging numbers into FCC-generated formulas. Indeed, the FCC's explanation of its determinations as to pricing of interconnection, network elements, resale, and transportation and termination consumes more than 370 paragraphs of the agency's order. J.A. 719-836, 843-71, 925-65 (¶¶ 618-862, 878-934, 1046-1118). In short, the FCC left no pricing issue of significance to the discretion of the very State commissions to whom Congress expressly assigned pricing authority.

For that reason, the States themselves have understandably been much less sanguine than the FCC about the effect of the Commission's pricing rules on their traditional authority. As 30 States jointly explained to the Eighth Circuit, "[t]he detail in the [FCC's] rules offer little discretion to the states to use their knowledge of local conditions to 'establish' the actual rates that will be paid to the [incumbent carriers]. . . . [Under the federal agency's rules], [t]he States do not share an 'essential, overlapping role' with the FCC, but become field agents sent out to execute the will of FCC officials." [10] Nothing in the statute supports—and nothing in the FCC's brief comes close to justifying—the agency's arrogation of power to conscript

[10] Joint Reply Brief for the State Commission Parties at 2 (8th Cir. No. 96-3321, filed Jan. 6, 1997).

these State regulators as foot soldiers for the federal bureaucracy.[11]

3. The structure of section 252(c) fortifies the conclusion that Congress entrusted pricing authority solely to the States. In defining the State commissions' arbitration responsibilities, section 252(c) creates a clear dichotomy between pricing and other matters. Subsection (c)(1) provides that, when States arbitrate "open issues" within the bounds of the matters assigned to the FCC, they must ensure that the result meets both "the requirements of section 251" *and* "the regulations prescribed by the [FCC] pursuant to section 251." Subsection (c)(2), by contrast, addresses pricing as a separate matter and makes *no* reference to any FCC rules. It provides only that States shall "establish rates . . . *according to subsection (d).*" Where Congress intended the State commissions to conform their arbitration decisions to FCC rules, it expressly said so. Congress said nothing about the State commissions following FCC *pricing* rules, precisely because no such FCC rules were contemplated. On the contrary, Congress intended the States alone to implement the Act's pricing standards, and that is why the only command to the States in section 252(c)(2) is that they set rates according to section 252(d). *See* Pet. App. 13a-14a.[12]

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[11] AT&T mistakenly asserts that this Court, in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), inferred a federal rulemaking role despite a clear grant of authority to the States to develop methods and standards. AT&T Br. 26. AT&T overlooks a pivotal fact: the statute at issue in *Wilder* expressly gave the Secretary of Health and Human Services a supervisory role over the States' formulation of the relevant standards. In the very provision AT&T cites, Congress specified that each State must "'mak[e] assurances satisfactory to the Secretary'" concerning the adequacy of the "'standards'" it develops. *See* 496 U.S. at 503 (quoting 42 U.S.C. § 1396(a)(13)(A) (Supp. 1982)). It is the absence of any comparable language in section 252(d) of the 1996 Act that dooms AT&T's argument and validates the Eighth Circuit's jurisdictional holding.

[12] The same dichotomy is echoed elsewhere in section 252. Congress provided that a State commission may reject an agreement

The FCC argues that the Court should disregard this important textual evidence because the "open issues" with which subsection (c)(1) is concerned necessarily include open *rate* issues. But rate issues are dealt with specifically in section 252(c)(2), and for several reasons it would make no sense to subject those issues *also* to section 252(c)(1). First, the regulations to which section 252(c)(1) refers are those implementing section 251; they can have nothing to do with pricing, which is dealt with in section 252. Second, if section 252(c)(1) could nonetheless be read to mandate adherence to FCC pricing rules, section 252(c)(2) would be rendered wholly superfluous. But "[s]tatutes must be interpreted, if possible, to give each word some operative effect." ***Walters v. Metropolitan Educ. Enters., Inc.***, 117 S. Ct. 660, 664 (1997). An interpretation that renders an entire provision superfluous is presumptively unreasonable. ***See Lane v. Pena,*** 116 S. Ct. 2092, 2100 (1996).

Finally, the FCC's argument ignores the 1996 Act's drafting history, which confirms that Congress separated out section 252(c)(2) as part of its effort to preserve State authority over the pricing of local interconnection arrangements. The predecessor to what is now section 252(c) was part of section 251 in the Senate bill that reached the Conference Committee. That predecessor provision, however, did *not* include the dichotomy now contained in section 252(c) and thus could have been read to require States to adhere to all FCC rules, including pricing rules. *See* S. 652, 104th Cong., 1st Sess. § 251(d)(5)(D) (1995) ("In resolving any open issues and imposing conditions upon the parties to the agree-

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adopted by arbitration only if it finds that the agreement "does not meet the requirements of section 251 . . ., including the regulations prescribed by the Commission pursuant to section 251 . . ., *or the standards set forth in subsection (d) of this section.*" 47 U.S.C. § 252(e)(2)(B) (emphasis added). As in section 252(c), Congress specifically differentiated between the statute's pricing standards and the FCC's regulations—further confirmation that the two things are separate from and unrelated to each other.

ment, a State shall ensure that the requirements of this section are met by the solution imposed by the State and are consistent with the Commission's rules defining minimum standards.").

In response to objections from the States,[18] however, the Conference Committee took several actions to revise the bill to protect traditional State authority over intrastate communications. First, the Conference Committee created a whole new statutory section, section 252, that treated pricing as a distinct issue entrusted exclusively to State authority. Then, to accommodate that important change, the Committee concurrently moved what had been part of section 251 to section 252(c) and, for the first time, bifurcated that provision to make clear that, as to pricing issues in particular, States need adhere only to the standards set forth in section 252(d) of the statute, not to any FCC regulations. *See* Conf. Rep. at 13. In combination with the plain language of sections 252(c) and 252(d), that history confirms that Congress affirmatively rejected a statutory scheme that would give the FCC the pricing authority it now claims and instead created one under which State commissions retain exclusive authority to set rates according to the statutory standards.

B. Section 2(b) and this Court's Decision in *Louisiana Public Service Commission* Confirm That the States Retain Exclusive Authority over Pricing.

1. Even if the Court were to determine that section 252(c) and (d) leave some doubt about whether Congress decided to retain State authority over pricing mat-

[18] *See, e.g.*, Initial Comments of National Association of Regulatory Utility Commissioners, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 10 (FCC May 16, 1996) (describing States' efforts to influence the Act before the Conference Committee); Comments of the Florida Public Service Commission, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 8 (FCC May 15, 1996).

ters, the result here would be no different. For over 60 years, Congress has confined the FCC's jurisdiction to interstate and foreign communications and has reserved for the States jurisdiction over intrastate communications. Section 2(b) of the Act, which was part of the original Communications Act of 1934, states that "*nothing* in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b) (emphasis added).

As this Court explained in *Louisiana PSC*, section 2(b) "defines the jurisdictional reach" of the FCC. 476 U.S. at 370. It "fences off" intrastate matters from the federal agency's authority, and its express limitations may be overcome only by an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the Commission. *Id.* at 377. Section 2(b) thus functions both as a "jurisdictional limit[ation] on the power of [the] federal agency" and as a "rule of statutory construction" that prevents the FCC from asserting authority in any case where it is "*at least possible*" that Congress intended to withhold such power. 476 U.S. at 376 n.5, 377 (emphasis added); *see id.* at 379 (where the Communications Act was not a "perfect puzzle" providing "crisp answers to all of the contentions of either party," section 2(b) mandated rejection of the FCC's assertion of intrastate authority).[14]

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[14] Section 2(b) reinforces an already powerful presumption against federal preemption of State public utility regulation—an area that this Court has recognized is traditionally a State concern. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States"). As the Court has explained, such "historic police powers of the States" may not be "superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Moreover, because section 2(b) provides its "own specific instructions regarding the correct approach to the statute" (476 U.S. at 376 n.5), it necessarily prevents the FCC from claiming deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Compare* FCC Br. 17, 42; AT&T Br. 19. The *Chevron* rule is intended to honor a presumed congressional intention to delegate to a federal agency the policy-making authority to interpret an ambiguous statute. *See, e.g., Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). But when Congress itself spells out the governing interpretive principles—as it has done in the plain text of section 2(b)—its specific intentions necessarily override any discretion the agency might have to apply any "reasonable" construction of a provision. Were it otherwise, a tool designed to implement an unstated congressional delegation of interpretive authority would operate perversely to frustrate an *express* interpretive principle contained in the statute itself.

2. The 1996 Act did nothing to undermine section 2(b)'s well-established role as a guarantor of federalism. The 1996 Act is an amendment to the Communications Act—the "Act" to which section 2(b) applies—and the new statute does not purport to supersede section 2(b)'s directive that "nothing" in the Communications Act shall be construed to give the FCC intrastate authority.

In fact, Congress expressly rejected attempts to strip States of the jurisdictional protections that section 2(b) provides. Just as the Conference Committee restored State pricing authority by creating a separate section 252 and introducing the important dichotomy between section 252(c)(1) and (c)(2), that Committee also ensured that section 2(b) would apply with full force to the 1996 Act. Both bills that reached the Conference Committee would have added "part II of title II"—that is, the local competition provisions of the 1996 Act—to the list of provisions exempted from section 2(b). *See* S. 652, 104th Cong., 1st Sess. § 101(c)(2) (1995); H.R. 1555, 104th

Cong., 1st Sess. § 101(e)(1) (1995). But, again to address State concerns, the Conference Committee deleted the proposed amendment of section 2(b).[15]

Because of that revision, the statute as enacted leaves the traditional interstate-intrastate division wholly intact except where section 251 or 252 clearly provides otherwise. And, for all the reasons we have discussed, far from providing the kind of "straightforward" or "unambiguous" assignment of pricing authority to the FCC that would be necessary to overcome section 2(b), the 1996 Act expressly indicates that the *States* are to have authority over such matters. Given the language of section 252(c) and (d), one cannot sensibly deny that "[i]t is . . . at least *possible*" (*Louisiana PSC*, 476 U.S. at 377 (emphasis added)) that Congress intended States to retain their longstanding authority. In the face of any such uncertainty, section 2(b) precludes an interpretation that would give the FCC the intrusive intrastate pricing jurisdiction it here demands.[16]

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[15] The FCC responds to this significant legislative history by relying on an exceedingly strained inference from the *absence* of explanatory discussion in the Conference Committee's Report. But, contrary to the Commission's suggestion, the Conference Committee nowhere indicated that its removal of these revisions to section 2(b) was "a technical, non-substantive change." FCC Br. 33 n.13; *see* MCI Br. 32-33. On the contrary, the Committee made clear that alterations which, like this one, were not specifically discussed in the Conference Report included not merely "minor drafting and clerical changes," but also "conforming changes made necessary by agreements reached by the conferees." Conf. Rep. at 113. Because the conferees did make a number of significant changes in the statute to preserve State authority—changes that *were* discussed in the Report (*id.* at 117-26)—it was inevitable that the revisions to section 2(b) would be deleted to conform to those changes.

[16] The same jurisdictional analysis applies to the dialing parity issue addressed in the Eighth Circuit's separate ruling (and covered thoroughly in California's brief in this Court). As in the lead case, the statutory language indicates that intrastate dialing parity issues were within the jurisdiction of the States, not the FCC. *See* 47 U.S.C. § 271(e)(2)(B) (specifying the dates by which "a State"

3. The FCC and its supporting petitioners make two attempts to avoid the clear import of section 2(b) and this Court's decision in *Louisiana PSC*. Neither has merit.

a. First, the Commission invites the Court to disregard the plain language of section 2(b). Despite the acknowledged fact (FCC Br. 34) that section 2(b) speaks in the disjunctive—it states that "nothing in this Act shall be construed to apply *or* to give the Commission jurisdiction with respect to" intrastate matters—the FCC contends that it is simply inconceivable that Congress meant what it said. Working from the Washington-centric, and entirely counter-textual, assumption that Congress would *never* pass a communications statute without intending the FCC to superintend every aspect—even every *intrastate* aspect—of that law, the agency argues that section 2(b) cannot "logically" be read to "detach" the scope of the statute from the scope of FCC authority. *See* FCC Br. 34; MCI Br. 43-44.

But that argument cannot be squared with the language Congress enacted. This Court has "refused to ignore the statutory meaning which would be presumed from . . . disjunctive language," explaining that "the use of the term 'or' indicates an intent to give the nouns their separate, normal meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). As this Court recently admonished: " 'Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.' "

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may or may not order dialing parity). Furthermore, the FCC cannot point to any unambiguous grant of dialing parity jurisdiction sufficient to overcome section 2(b). Indeed, the FCC expressly acknowledged in its dialing parity order that the interstate and intrastate aspects of dialing parity could easily be regulated separately. *See* J.A. 1183 (Second Report and Order, ¶ 37). That concession in itself is fatal to the Commission's jurisdictional assertion in this Court.

United States v. Gonzales, 117 S. Ct. 1032, 1036 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)). Indeed, the language of section 2(b) is so free of ambiguity that the FCC hazards no textual argument at all to support its interpretation of the statute.

The only argument the FCC *does* make to support its idiosyncratic understanding of section 2(b) has already been rejected by this Court. The FCC contends that section 2(b) was intended exclusively to overturn the ruling in the so-called *Shreveport Rate Case* (*Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914)). In the Commission's view, because that case dealt only with "ancillary" FCC jurisdiction over topics not expressly covered by the statute, section 2(b) cannot be understood to extend beyond that context. FCC Br. 34-35; MCI Br. 44-45. The argument crashes head-on into this Court's decision in *Louisiana PSC*. The respondents there, like petitioners here, argued that section 2(b) should be read narrowly as merely an attempt to overturn the *Shreveport Rate Case*. But the Court squarely rejected that assertion, holding that "the *Shreveport Rate Case* [does not] carry the load that respondents ask of it." 476 U.S. at 372. The Court concluded that, "given the breadth of [its] language," section 2(b) *cannot* be cabined in the very manner that the FCC suggests here. *Id*. at 373.

b. The Commission's other argument as to why the Court should not give effect to section 2(b)'s plain language is no more compelling. The FCC contends that, under a narrow exception recognized in some court of appeals decisions, it may use its *inter*state authority as an entering wedge to usurp control over all aspects of local, *intra*state communications.

The short—and conclusive—answer to this argument is that it appears *nowhere* in the FCC's 700-page First Report and Order. That is not surprising, because the Commission could not possibly have justified its jurisdictional claims on the basis of that theory.

The governing rule, under the cases the FCC itself invokes, is that the agency must demonstrate "with some specificity" that it is "*impossib*[*le*]" for both the FCC and a State to regulate a facility used jointly for interstate and intrastate calls and that the State's regulation "negates the exercise by the FCC of its own lawful authority over *interstate* communication." *NARUC v. FCC*, 880 F.2d 422, 429-30 (D.C. Cir. 1989) (emphasis added); *accord California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). The First Report and Order contains no discussion at all of the impossibility doctrine, much less a showing of how the strict requirements of that preemption doctrine can be satisfied here.[17] That deficiency is fatal, because this Court has said repeatedly that courts may not accept "*post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). An agency's order must be upheld, if at all, on "the basis upon which it purports to rest." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The FCC had good reason not to rely on any such analysis in its order. In the first place, this after-the-fact justification does not even support what the agency actually did in its order. The bulk of the matters for which the FCC purported to create pricing rules include services that have *no interstate component at all.* Resale of an incumbent's existing local services and reciprocal compensation for the transport and termination of local calls, for example, are purely intrastate matters. Indeed, although the FCC's brief to this Court completely ignores this in-

[17] The portions of the agency's order cited in the FCC's brief are not to the contrary. *See* FCC Br. 36-37 (citing Pet. App. 191a, 194a-95a, which reprint ¶¶ 84-85 and 90-93 of the First Report and Order (J.A. 448-49, 450-52. Those paragraphs merely explain the FCC's jurisdictional theory, including why it believed that a dual federal-State pricing regime for interconnection agreements would be inconsistent with sections 251 and 252. What is missing is any analysis of the sort necessary to sustain, in the face of section 2(b), an assertion of intrastate pricing jurisdiction.

convenient fact, the Commission actually *conceded* the point in the Eighth Circuit. *See* Brief for Respondents FCC and the United States at 30 (8th Cir. No. 96-3321, filed Dec. 23, 1996) (noting that certain matters covered by the agency's pricing rules, including the "resale of local exchange service," are "admittedly solely intrastate"). That alone is fatal to the FCC's impossibility claim. It is untenable to suggest that the 1996 Act tacitly lifts the section 2(b) bar as to some, but not all, of these pricing issues.

Even as to the one significant aspect of the pricing rules for which the FCC can plausibly identify an interstate component—access to unbundled network elements that may be used to deliver long-distance calls—the agency's theory plainly proves too much. Under the FCC's logic, the Commission would have had jurisdiction to impose every single one of its rules governing access to these local facilities, including its pricing rules, based entirely on its jurisdiction over interstate communications, *even before Congress adopted the 1996 Act.* Sections 251 and 252 were largely superfluous, in the FCC's view, because under the Communications Act the agency has had latent power for six decades to regulate intrastate rates for every aspect of the local network.

This Court rejected essentially the same argument in *Louisiana PSC.* The FCC there sought to preempt State depreciation rules and to substitute its own nationally uniform rules on the theory (echoed almost verbatim here) that the telephone equipment at issue was used for both interstate and intrastate calls and that "it makes no sense within the context of the Act to depreciate one piece of property two ways." 476 U.S. at 375. But, observing that "virtually *all* telephone plant that is used to provide intrastate service is also used to provide interstate service" (*id.* at 360 (emphasis added)), the Court *refused* to "confine[]" State regulation (as the FCC again asks the Court to do) "to intrastate matters which are separable from and do not substantially affect interstate communication" (*id.* at 373 (internal quotation marks omitted)).

After *Louisiana PSC*, the courts of appeals have consistently rejected similar FCC arguments in other contexts. The settled rule is that preemption may "*not* be justified merely by the dual intrastate and interstate aspects of [a particular service]; the FCC [has] to show that it [can]not separate the interstate and intrastate components of its regulation." *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1333 (D.C. Cir. 1989) (emphasis added); *see also Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1516 (D.C. Cir. 1990). No such showing could be made here. The simple fact is that the FCC and the States have separately determined the prices for interstate and intrastate calls delivered over local telephone networks for more than 60 years, and the impossibility exception has never been applied in this context. And here, far from being powerless to regulate interstate aspects of unbundled network elements, the FCC has continued to issue regulations governing the interstate charges that incumbents may levy (or not levy) when competitors deliver long-distance calls over those elements. *See Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (upholding FCC rules on payment of interstate access charges by purchasers of network elements).

Nor can the FCC demonstrate that a State commission's regulation of the rates for local interconnection would "negate" the federal agency's exercise of its own lawful interstate authority. In particular, while the FCC *assumes* that it has some sort of interstate pricing authority with respect to unbundled network elements beyond its traditional authority over charges assessed for the delivery of long-distance calls over the local network, that assumption begs the very question before the Court. Contrary to the FCC's supposition, it can point to *no* lawful pricing jurisdiction of its own that is even arguably negated by State pricing regulation, because Congress expressly assigned only to the States the authority to determine rates for access to network elements.

C. Neither Section 251(d)(1) Nor Any of the Other Provisions Cited by the Commission Justifies the FCC's Assertion of Pricing Authority.

Unable to ground its argument in the directly applicable pricing provisions of the 1996 Act, and unable to circumvent the jurisdictional barrier of section 2(b), the FCC seeks support for its expansive jurisdictional aspirations elsewhere in the statute. But none of the provisions to which the Commission points gives the FCC supervisory power to regulate the pricing of local interconnection arrangements.

1. The FCC rests principally on section 251(d)(1). FCC Br. 18-20. That provision—which directs the agency to complete, within six months of enactment, all actions necessary "to establish regulations to implement the requirements of this section"—does not support the Commission's jurisdictional theory.

First, when Congress issues clear directions on a specific subject—as it did in authorizing State commissions to "determine" appropriate rates under the standards of section 252(d)—that specific directive takes precedence over a general provision like section 251(d)(1). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (internal quotation marks omitted).

Second, section 251(d)(1) does not even purport to encompass the pricing provisions of section 252. Rather, its scope is confined, by its plain terms, to "the requirements of *this section*"—that is, section 251. The statutory pricing rules are not in "this section"—they are in section 252(d). Accordingly, the FCC's lead argument invites this Court to ignore the statute's specific assignment of pricing jurisdiction to the States in section 252 as well as the jurisdictional prohibition of section 2(b), in favor of

a general rulemaking provision that, on its face, imposes a time-limit for the FCC to implement *a different statutory section.* That approach does violence to the ordinary rules of statutory interpretation.

In an attempt to plug the holes in its argument, the FCC says that subsections 251(c)(2) and (c)(3), which impose interconnection and unbundling obligations on incumbents, refer to "the requirements of this section and section 252." FCC Br. 28 n.10. From that premise, it argues that its authority to implement section 251 extends by implication to section 252. But if Congress had intended the FCC to implement section 251 *and* section 252, it could easily have said so in section 251(d)(1). It had no reason to express such an intention in the circuitous fashion reflected in the FCC's reading.

Furthermore, the FCC's theory does not support what the agency actually did. The FCC's order claimed authority to set prices not only for interconnection and network elements under subsections (c)(2) and (c)(3)—the two provisions that mention section 252—but also for the purchase of services for resale under subsection (c)(4). In its argument here, however, the Commission neglects to mention that subsection (c)(4) contains no such reference to section 252. Even on its own terms, therefore, the FCC's argument falls short of its target: the agency has no textual foundation at all for its arrogation of authority to dictate pricing principles for resale. And this flaw in its analysis undermines the Commission's improbable theory that, despite the restrictive language of section 251(d)(1), "this section" must be understood to signify *both* section 251 *and* section 252.

Even if the FCC's analysis were not deficient on its face, it would be thoroughly discredited by section 252(d). That section demonstrates the real meaning of the references to section 252: it specifies in plain language that "a State commission" is to determine the just and reasonable rates "*for purposes of*" section 251(c)(2) and section 251(c)(3)—the very sections on which the FCC

relies for its appropriation of the States' ratemaking function. That specific and unambiguous provision closes the loop between section 251 and section 252 and makes clear that a State commission, not the FCC, has jurisdiction to determine prices. It therefore stands squarely in the path of the FCC's theory: one cannot plausibly infer from section 251's references to section 252 that Congress intended to give the FCC indirectly pricing authority that it withheld from section 251(d)(1) and that it conferred expressly on the States in section 252(d).

In any event, section 251(d)(1) actually has no bearing at all on the scope of the FCC's jurisdiction. As its plain language suggests, subsection (d)(1) deals not with jurisdiction, but with the distinct question of rulemaking power—and, as the Eighth Circuit held, it operates to restrict rather than expand that power. The section directs the FCC, "[w]ithin 6 months [after the date of enactment]," to "complete all actions *necessary to establish regulations* to implement the requirements of this section." 47 U.S.C. § 251(d)(1) (emphasis added). Nothing in that procedural mandate delegates substantive authority to the FCC, and it certainly does not do so in the unambiguous manner required to surmount the section 2(b) hurdle.

When Congress wanted to extend the FCC's authority to intrastate matters, it did so explicitly. In section 276 of the 1996 Act, for example, Congress not only directed the FCC to prescribe payphone regulations within nine months using terms nearly identical to those in section 251(d)(1),[18] but also separately gave the FCC substantive jurisdiction with respect to "each and every completed *intrastate and interstate* call," and expressly preempted any contrary state regulations. 47 U.S.C. § 276(b), (c) (emphasis added). Similarly, in section 225, a provision that predates the 1996 Act, Congress not only instructed the FCC to issue regulations within one year to implement the requirements

[18] "[W]ithin 9 months [of enactment of the Telecommunications Act of 1996], the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that— . . . ." 47 U.S.C. § 276(b)(1).

of that section (*id.* § 225(d)(1)), but also provided that the Commission "shall have the same authority, power, and functions with respect to . . . *intrastate* communications" as it does with respect to interstate communications. *Id.* § 225(b)(2) (emphasis added).

And the Cable Act—to which the FCC itself pointed as a jurisdictional analog in the court of appeals—provides an even more vivid illustration. There, as in section 251(d)(1), Congress directed the Commission to prescribe regulations within 180 days to carry out its responsibilities under the Act. 47 U.S.C. § 543(b)(2). Unlike the 1996 Act, however, the Cable Act also assigned the Commission *substantive jurisdiction* over the rates to be charged by cable systems. The Cable Act provides that "[t]he Commission shall, by regulation, ensure that [cable] rates . . . are reasonable" (*id.* § 543(b)(1)), and it enumerates seven "factors" that the FCC is required to "take into account" in prescribing its rate regulations (*id.* § 543(b)(2)). Also unlike the 1996 Act, the Cable Act expressly directed State regulators to follow the FCC's rate regulations: "the rates for the provision of basic cable service shall be subject to regulation by a franchising authority . . . *in accordance with the regulations prescribed by the Commission.*" *Id.* § 543(a)(2)(A) (emphasis added).

These provisions bring sharply into focus the missing links in the FCC's statutory argument. The 1996 Act assigns the FCC *no* substantive pricing jurisdiction. Instead, Congress entrusted pricing authority entirely to State commissions. 47 U.S.C. § 252(c), (d). Nor does the 1996 Act require States to follow any FCC pricing rules. On the contrary, as we have discussed, Congress went out of its way in section 252(c) to specify separately that States are to set rates only "according to subsection (d)."

The FCC would have this Court treat section 251 as if it contained the same terms found in these other provisions, an approach that cannot be squared with fundamental canons of statutory interpretation. As this Court

has said repeatedly, "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates v. United States*, 118 S. Ct. 285, 290 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

2. Because the language of section 251(d)(1) is so different from the text of these other provisions—and so clearly fails to provide the requisite straightforward grant of pricing jurisdiction—the FCC must rummage through the statute searching for other shreds of supporting evidence. Its quest is fruitless.

The FCC argues most strenuously that, unless section 251(d)(1) provides sweeping jurisdiction over *every* local competition issue, including pricing, there is no way to explain how the FCC obtains authority over other specific issues as to which all parties agree that the FCC has some role. According to the FCC, these other provisions "assume[]" a separate assignment of pricing authority that can come only from section 251(d)(1). FCC Br. 22.

But no such inference is required to make sense of these other provisions. On the contrary, where Congress wanted the FCC to exercise authority over a specific matter, it made that quite clear on the face of the statute. Section 251(e)(1), for example, grants the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering." Similarly, section 251(h) states that "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier." And section 251(b)(2) makes plain that the Commission is to "prescribe" the "requirements" for "number portability." There is nothing either equivocal or obscure about these specific grants of jurisdiction, and there is consequently no need at all to invest section 251(d)(1) with

an importance that its plain language will not support. Indeed, the real question here is this: if section 251(d)(1) *already* provided the FCC with generic authority over all of sections 251 and 252, why would Congress have included these specific delegations of authority to the FCC?

Section 251(d)(2), on which the FCC places particular reliance, does not differ meaningfully from these other grants of authority. By stating that the FCC must consider certain factors "in determining what network elements should be made available," that provision *itself* necessarily authorizes the FCC to make such a "determina[tion]" in the first place. Indeed, the FCC has read the provision in precisely that fashion. *See* J.A. 546 (¶ 279) (discussing the "authority we derive from section 251(d)(2)").[19] There is simply no basis for the Commission's theory that the syntax of section 251(d)(2) bears significant jurisdictional implications that dictate a reading of section 251(d)(1) not supported by the plain terms of that provision.

In any event, the fact that the FCC is driven to rely on such tenuous implications from statutory provisions having nothing to do with pricing demonstrates just how far the agency has strayed from establishing that Congress straightforwardly and unambiguously granted it intrastate jurisdiction. Indeed, the FCC's arguments on this score again conflict with *Louisiana PSC*, where this Court concluded that much stronger—and more directly applicable—implications in the statutory text fell short of the clear

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[19] The FCC has similarly relied upon the other specific provisions in section 251 as sources of authority. *See, e.g.*, First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 FCC Rcd 8352, 8370, 8411 (¶¶ 36, 114) (1996) ("section[] 251(b)(2) . . . give[s] to the Commission the authority . . . ."); *id.* at 8417 (¶ 126) ("section 251(e)(2) gives us specific authority"); *id.* at 8464 (¶ 220) ("section 251(e)(2) gives the Commission the authority").

congressional directive necessary to overcome section 2(b).[20]

The other provisions on which the FCC relies provide even weaker evidence of a congressional design to subject States to all-encompassing supervision by the federal bureaucracy. Contrary to the FCC's argument, section 251(d)(3) is an *anti*-preemption provision which limits the FCC's ability to "preclude the enforcement" of any *State* access or interconnection regulations. That subsection, like the many other anti-preemption provisions in the statute,[21] is intended to preserve State authority and presumes that the States, not the FCC, have authority to adopt intrastate access and interconnection regulations in the first instance. Section 253(d), another provision cited by the Commission, also undermines the

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[20] In *Louisiana PSC*, respondents asked the Court to infer from indications in section 220 that Congress "'clearly intended'" to give the FCC authority over depreciation issues for both interstate and intrastate purposes. *See* 476 U.S. at 367-68 (quoting respondents' brief). Respondents stressed, among other things, (1) that a subsection of section 220 made it unlawful to "keep *any* other accounts" apart from those mandated by the FCC, (2) that another part of section 220 required all carriers to adhere to FCC rules over any contrary State rules unless the FCC specifically "except[s]" them from federal regulation, and (3) that the FCC must have been given intrastate authority because a provision authorized the States only to "present [their] views" to the federal agency. *See id.* This Court found that these provisions, even in combination, were not sufficient to grant the FCC intrastate authority. *Id.*

[21] *See, e.g.*, 47 U.S.C. 261(b) ("Nothing in this part shall be construed to prohibit any State commission from . . . prescribing regulations . . . in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part."); 1996 Act § 601(c) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." (reprinted at 47 U.S.C. § 152 note)).

FCC's claim. Section 253(d) again assumes that the States, not the FCC, will issue rules in the first instance. It authorizes the FCC to preempt such rules only where it determines, on a case-by-case basis and "after notice and an opportunity for public comment," that a State "has permitted or imposed" an offending legal requirement. 47 U.S.C. § 253(d). That case-specific, after-the-fact preemption authority does not empower the Commission, acting in advance and without reference to any particular requirements, broadly to displace the States from their historical regulatory domain.[22]

3. The FCC also suggests that section 271 provides "compelling evidence" of the federal agency's pricing authority. *See* FCC Br. 29-31; AT&T Br. 31-32. In the FCC's view, because section 271 authorizes the FCC to assess a Bell company's compliance with section 271's "competitive checklist" in order to determine whether the company may provide long-distance service, and because the checklist requires interconnection "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)"

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[22] The final item on the FCC's laundry list of inapplicable 1996 Act provisions is section 160, the statutory "forbearance" provision. Because the FCC and its supporters failed to present this argument in their briefs below, the court of appeals refused to consider it (Pet. App. 13a n.11), and this Court should do likewise. In any event, it has no merit. As the FCC notes (FCC Br. 24-25), section 160 states that the FCC may not forbear from applying "*the requirements* of section 251(c)," which impose obligations on incumbent LECs. 47 U.S.C. § 160(d). But there is no dispute here that the FCC has authority over certain aspects of section 251(c): Congress expected the FCC to impose appropriate limitations on resale (*see* 47 U.S.C. § 251(c)(4)(B)) and to determine "what network elements should be made available for purposes of subsection (c)(3)" (*see* 47 U.S.C. § 251(d)(2)). Contrary to the FCC's claim, it would not have "made little sense" for Congress to preclude the forbearance of these provisions until section 251(c) is "fully implemented." FCC Br. 24-25. What *does* make little sense is to read into this forbearance provision an implication that the FCC must have pricing jurisdiction nowhere granted in the Act's substantive provisions.

(47 U.S.C. § 271(c)(2)(B)(i)),[23] section 271 necessarily authorizes the agency to formulate substantive pricing standards. *See* FCC Br. 29-31.

That inference is unwarranted. Section 271 by its terms neither creates pricing standards nor empowers the FCC to define any such standards. Instead, it incorporates the substantive pricing determinations that the statute entrusts to State commissions: the pricing "requirements" to which section 271 refers are the "just and reasonable rate[s]" that are "[d]etermin[ed] by a *State commission*." 47 U.S.C. § 252(d)(1) (emphasis added). With respect to pricing, therefore, it necessarily follows that the FCC, in passing on a section 271 application, can require no more than interconnection in accordance with the pricing principles promulgated *by the States* pursuant to sections 251 and 252.

Contrary to the FCC's supposition, this conclusion does not force the FCC to "abdicate [its] compliance inquiry to each of 50 state commissions." FCC Br. 30. On the contrary, the FCC still has the ultimate responsibility to "find[]" (47 U.S.C. § 271(d)(3)) whether a Bell company is in *compliance* with the relevant pricing requirements—in statutory terms, the Bell company has "fully implemented" its obligations. The State commissions' responsibility, by contrast, is to *define* the pricing obligations with which the Bell company must comply. Those discrete roles are wholly compatible and complementary.[24]

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[23] *See also* 47 U.S.C. § 271(c)(2)(B)(ii), (xiii), (xiv).

[24] Nor does the existence of the Communications Act's administrative complaint provision, 47 U.S.C. § 208, provide any support for the notion that the FCC is expected to play a role in reviewing State pricing determinations. *See* AT&T Br. 29, 30; MCI Br. 38. On the contrary, as the Eighth Circuit correctly held (Pet. App. 31a-34a), Congress prescribed a carefully tailored review mechanism under which any aggrieved party may seek relief only from a *federal district court*, not from the FCC. *See* 47 U.S.C. § 252(e)(6). Nothing in section 208 permits the FCC to override that congres-

4. Finally, section 201(b) does not fill the FCC's jurisdictional void. Wrenching the last sentence of section 201(b) entirely out of context, the FCC claims that section 201 allows the FCC to exercise jurisdiction over every section of the Communications Act, whether interstate or intrastate. *See* FCC Br. 19-20. But section 201, by its plain terms, involves only the FCC's authority over "*interstate or foreign* communication" services. 47 U.S.C. § 201(a) (emphasis added). It is altogether implausible to infer that section 201(b) provides "unqualified textual authority" (FCC Br. 20) wholly detached from the limitations contained in section 201(a). On the contrary, section 201(b) uses the phrase "*such* communication service," and the word "such" plainly refers to the "*interstate or foreign* communication" services mentioned in the immediately preceding sentence in section 201(a). Thus, the FCC's argument ultimately boils down to the improbable proposition that, unlike every other aspect of section 201, the last sentence of section 201(b)—the sentence that gives the FCC authority over the "provisions of this Act"—applies to intrastate as well as interstate matters. But all statutory language, "plain or not," must be read in context. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). And the context here plainly forecloses the FCC's understanding.

Furthermore, Congress does not legislate in a vacuum. Section 201(b), like every other provision of the Act, must be read in light of section 2(b), which establishes the jurisdictional framework on which Congress has built the statute. If an isolated sentence in a provision dealing exclusively with interstate and foreign communications can be ripped out of that provision and construed to

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sional determination by holding itself out as an alternative forum for reviewing precisely the same State determinations. *Cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 209 (1994). That conclusion is fortified by the fact that the FCC's jurisdiction to hear complaints under section 208 is necessarily limited by the proscription of section 2(b). *See* Pet. App. 33a-34a.

give the FCC intrastate jurisdiction denied to the agency by section 2(b), then Congress truly wasted its breath when it stated that "nothing in [the Communications Act] shall be construed . . . to give the Commission jurisdiction with respect to" intrastate matters. The Court should reject this distorted reading of the statute. *See Louisiana PSC*, 476 U.S. at 369-70 (refusing to read 47 U.S.C. § 151, which sets forth the purposes of the Communications Act, in a manner inconsistent with section 2(b)).[25]

D. The FCC's Policy Arguments Do Not Support a Different Result.

In perhaps its most audacious argument, the FCC, joined by AT&T and MCI, presumes to second-guess the litigation judgment of the State commissions that have expended considerable resources vindicating their jurisdictional prerogatives. The FCC claims that the State commissions are wasting their time and money, because even if they prevail in this case, they will have gained no greater authority. As the FCC sees the matter, the federal courts will ultimately dictate the proper results to the States in reviewing arbitration decisions under section 252(e)(6). To the FCC, the only question here is not "whether" the States will be put in a federal straitjacket but "when." FCC Br. 40.

The FCC is wrong in all respects. To begin with, the decentralized, State-centered scheme the FCC decries as

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[25] Nor does section 4(i) advance the FCC's position. *Compare* FCC Br. 19-20 n.5; MCI Br. 28 n.19. It is merely a generic "necessary and proper" clause empowering the FCC to execute the substantive authority granted elsewhere in the statute; it confers no added jurisdiction itself. *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990); *AT&T v. FCC*, 487 F.2d 865, 877 (2d Cir. 1973). The same is true of section 303(r), which applies "*except as otherwise provided in this* [*Act*]" (47 U.S.C. § 303 (emphasis added)) and which appears in Title III of the Act: "Provisions Relating to Radio." Neither of these provisions can take precedence over the allocation of pricing authority in section 252 or the jurisdictional rule of section 2(b).

"cumbersome" is known as federalism, and it is the scheme that Congress believed best in these circumstances. The FCC's self-aggrandizing belief that Congress would have done better by centralizing all significant authority in Washington is an argument best made to the legislature, not this Court.

Equally important, the FCC's theory is predicated on a mistaken premise. The statute does not impose a one-size-fits-all regime in which every question has only one possible answer. Rather, the statute leaves room for differing discretionary judgments, allowing each State sufficient latitude to adapt the Act in a manner that best accommodates local needs and circumstances. That explains why Congress, perhaps anticipating the FCC's preemptive jurisdictional appetite, was so careful to protect the authority of State commissions to implement the statute's local competition provisions. It provided that "[n]othing in this part [*i.e.*, the provisions relating to local competition] shall be construed to prohibit any State commission from . . . prescribing regulations . . . in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." 47 U.S.C. § 261(b). That guarantee of State autonomy and discretion forecloses the FCC's vision of monolithic federal regulatory control and undermines its theory that the States are limited to adjudicating disputes according to rules announced in Washington.

To be sure, the statute imposes limits on the States' discretion—limits that the federal courts have authority to enforce.[26] But within the bounds of those limitations, the statute has sufficient play in its joints to permit States to

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[26] For example, Congress meant what it said when it required prices to be based on the incumbent's "cost . . . of providing" interconnection or network elements. 47 U.S.C. § 252(d)(1). Broad though the States' leeway may be, they could not lawfully set rates that disregard an incumbent's actual costs.

resolve disputes in reasonable ways that may vary from jurisdiction to jurisdiction.[27]

II. THE FCC'S UNBUNDLING RULES CANNOT BE RECONCILED WITH THE LANGUAGE, STRUCTURE, OR PURPOSES OF THE 1996 ACT.

In the 1996 Act, Congress was careful to preserve a clear statutory distinction between resale and the purchase of unbundled network elements. It established separate pricing schemes and separate marketing rules for the two modes of entry. And it placed various limitations on the purchase and use of unbundled network elements. For example, the Act defined network elements only in terms of the incumbents' physical facilities (not its services); an incumbent must make network elements available only if their absence would otherwise impair the new entrant's ability to provide local service; and, most important, the requesting carrier, not the incumbent, has the responsibility to "combine such elements in order to provide . . . tele-

[27] AT&T seeks illegitimately to smuggle into this case, under cover of its jurisdictional arguments, challenges to non-jurisdictional rulings that it failed to preserve in its petition for certiorari. *See* AT&T Br. 32-34. Nothing in the questions presented or the arguments made in that petition provided either the Court or the parties with notice that AT&T intended to raise these collateral, non-jurisdictional issues. This Court therefore should not consider them. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system."). In any event, AT&T's substantive arguments are meritless. The Eighth Circuit vacated each of the rules that AT&T defends, not because of any jurisdictionally based theory concerning the FCC's interpretive authority (*see* AT&T Br. 32-33), but because each violated the plain language and structure of the 1996 Act. *See* Pet. App. 46a-47a (presumption that incumbents must provide access to network elements to the extent technically feasible is "contrary to the plain meaning of the Act"); *id.* at 51a-52a (FCC's "superior quality" rules "cannot stand in light of the plain terms of the Act"); *id.* at 52a-53a (FCC's rules on combining elements not currently linked in the incumbent's network conflicts with the statute's "plain meaning").

communications service." 47 U.S.C. § 251(c)(3). Thus, although the incumbent must make physical parts of its network available to the new entrant, it is up to the new entrant itself to incorporate those pieces into its own network in order to provide a finished service. The use of unbundled elements is therefore fundamentally different from resale, in which a competitor purchases the incumbent's finished retail service at a wholesale price for resale to the competitor's customers.

The FCC's regulations utterly obliterated the statutory distinction between resale and the use of unbundled network elements. Most egregiously, the Commission allowed new entrants to purchase all the elements necessary to provide the same finished service that the incumbent provides and required the incumbent itself to combine those network elements into such a complete service for the new entrant. Consequently, a competitor without any facilities of its own and without performing any additional work can order the functional equivalent of resale—all the incumbent's network elements pre-combined into the same finished service provided by the incumbent—under the separate pricing and marketing rules that are supposed to apply only to unbundled network elements. At the same time, the Commission expanded the definition of network elements beyond all proper bounds and vitiated statutory restrictions on the circumstances under which a new entrant can order those elements.

Each of the Commission's rules that we discuss below is contrary to the language and structure of the statute, and each is inconsistent with Congress's goals in the 1996 Act—increased competition through greater investment and innovation, the preservation of universal service, and enhanced consumer welfare. Taken together, these rules thoroughly undermine those objectives and yield a scheme that bears no resemblance to the one Congress enacted into law.

A. The FCC Has Destroyed the Statutory Distinction Between Resale and Unbundled Network Elements.

1. The 1996 Act requires incumbents to offer network elements to entrants "on an unbundled basis at any technically feasible point" and in a "manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). This rule allows companies that have some network facilities of their own to fill in their networks by purchasing individual pieces of the incumbent's network. Congress understood, for example, that cable television companies planned to use their existing door-to-door networks to carry telephone calls as well as TV signals, but lacked the switches needed to direct calls from one customer to another. *See* Conf. Rep. at 148. Similarly, the press reported during consideration of the 1996 Act that AT&T had already installed local telephone switches, but would seek to buy the wires (known as "local loops") needed to connect those switches to individual homes and businesses.[28] Access to unbundled elements is a way to assist such *facilities-based* carriers by giving them access to specific elements so that they will not have to replicate the incumbent's entire network overnight. *See* Conf. Rep. at 148 (recognizing "that it is unlikely that competitors will have a *fully* redundant network in place when they initially offer local service" and that competitors may need initially to obtain "[*s*]*ome* facilities and capabilities (*e.g.*, central office switching)" from the incumbent) (emphasis added).

Resale is different. Instead of giving facilities-based competitors an opportunity to obtain and combine individual pieces of the incumbent's network, resale allows competitors *without* facilities—or without facilities sufficient to provide certain services or to meet the needs of certain customers—to obtain at wholesale prices the *complete* telecommunications services that the incumbent

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[28] *See* John Keller, *AT&T Eagerly Plots a Strategy to Gobble Local Phone Business*, Wall St. J., Aug. 21, 1995, at A1.

currently provides at retail. *See* 47 U.S.C. § 251(c)(4)(A) (requiring incumbents "to offer for resale at wholesale rates any telecommunication service that the carrier provides at retail to subscribers who are not telecommunications carriers").

Congress did not intend these methods of entry to be interchangeable. On the contrary, the 1996 Act repeatedly distinguishes between them. Most importantly, Congress provided different pricing rules for each mode of entry. Users of network elements need pay rates based only on the incumbent's "cost . . . of providing" those elements. *See id.* § 252(d)(1)(A). By contrast, resellers pay rates based on the retail prices that the incumbent currently charges its customers for the services at issue. The statute directs State commissions to determine wholesale rates "on the basis of the [incumbent's] retail rates charged to subscribers" less only those costs that "will be avoided" by selling at wholesale. *Id.* § 252(d)(3).

Nor is that the only distinction between resale and unbundled network elements. The 1996 Act allows the major long-distance carriers to offer jointly marketed local and long-distance service *only* if they enter the local market by using some of their own facilities, supplemented as necessary by the incumbent's network elements. If these companies enter merely as resellers, they may not offer such "one-stop shopping" packages of local and long-distance services for three years or until the relevant Bell company receives long-distance authority. *See* 47 U.S.C. § 271(e)(1).

These statutory distinctions serve crucial purposes. First, as we have explained, most jurisdictions require incumbents to charge below-cost rates for basic service (especially for rural and residential customers), and allow incumbents to offset those under-recoveries by charging above-cost rates to business and other customers. And, contrary to the baseless suggestion in MCI's brief (MCI Br. 25), that situation may persist indefinitely: while section 254(f) requires States with a universal service pro-

gram to ensure that all carriers contribute equitably to universal service, it does not specify a date certain for the removal of implicit *intra*state subsidies.

If, during the potentially lengthy period in which incumbents must rely on these implicit subsidies to recover their costs, new entrants may obtain complete services at cost-based rates, they will easily siphon away the incumbents' valuable business customers. They will do so *not* by providing a better or lower-cost service, but simply by undercutting the above-cost rates that incumbents must charge to subsidize their other services. Such regulatory arbitrage would take away the revenues that incumbents use to support affordable rates for rural and residential consumers, leading to massive pressure on the rates of those consumers and enormous losses for incumbents.

Simply put, the end result of such gamesmanship would be that competitors would steal incumbents' profitable customers without adding any value to the incumbents' service and would leave incumbents with the high-cost customers that competitors have no interest in serving. By tying wholesale prices to *retail* rates and thus ensuring that these prices account for universal service subsidies, Congress sought to avoid these negative effects. *See* H.R. Rep. No. 104-204, at 72 ("The [wholesale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . .").

Second, as even the FCC has recognized, "[t]he interconnection provisions of the Act, Section[s] 251 and 252, are designed to promote *facilities-based* local exchange competition." Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 11 FCC Rcd 16639, 16678-79 (¶ 80) (1996) (emphasis added). Congress understood that a vigorous competitive market in local telephony will exist only when newcomers have built their own physical facilities to

compete with the incumbent's networks. The Act is thus intended to "give[] new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company." 141 Cong. Rec. H8465 (daily ed. Aug. 2, 1995) (Rep. Goodlatte); Conf. Rep. at 1 (statute intended "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies"). *See generally* 3A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773b1 at 204 (revised ed. 1996) ("competition [is] increased by encouraging [firms] to [develop rival facilities], rather than taking the easier and less competitive course of obtaining access to another's facilities").

The statutory pricing rules are carefully calibrated to achieve that goal. A reseller must pay a wholesale price that reflects the universal service subsidies built into the incumbent's retail rates; it can compete with the incumbent by performing marketing and billing functions more efficiently. A facilities-based competitor, by contrast, can avoid the universal service component in the incumbent's retail rates, and it can seek efficiency advantages throughout its network. To the extent that it does not yet have a complete network of its own, moreover, it can purchase at cost-based rates the incumbent's individual network elements. The statute thus encourages a new entrant to avoid buying at wholesale, but only by building a network of its own, supplemented where necessary with the incumbent's unbundled network elements.

2. Ever since Congress enacted the 1996 Act, however, AT&T and MCI have fought to obtain the very thing that Congress denied them—the ability to obtain incumbents' complete retail services at cost-based rates instead of wholesale rates based on current retail prices.

The mechanism that AT&T and MCI have seized upon to obtain that goal is the so-called unbundled network element "platform." Under the "platform" approach, AT&T and MCI do not expressly ask an incumbent for access to a particular finished service for resale. Instead,

they ask for the same thing using different words: they request *all* the network elements needed to replicate that same service, *already combined* in the configuration necessary to provide the service. Simply by using those different words, AT&T and MCI hope to obtain the identical product—the finished retail service of the incumbent carrier—at much lower, cost-based rates. For the reasons we have discussed, if AT&T and MCI are allowed to use this "platform" approach, they will obtain enormous, guaranteed profits through regulatory arbitrage without making any contribution to universal service, without investing in any facilities, without incurring any of the ongoing costs associated with maintaining a real telecommunications network (costs related to such obligations as testing and repairing facilities and maintaining network records), and without undertaking any business risk. As AT&T's President accordingly boasted, the "platform" is simply *"another way to resell,"* but it results in discounts for AT&T that are as much as *300%* larger than those authorized under the statutory resale pricing rules.[29]

Instead of putting a stop to these improper and destructive attempts to evade the statutory resale rules, the FCC has chosen to facilitate them. The FCC's rules permit a new entrant to pay cost-based rates and to avoid the joint marketing proscription even when that entrant does nothing more than a reseller—that is, even when it (1) relies exclusively on the incumbent's network elements to recreate an existing end-to-end service and (2) obtains those elements *already combined* by the incumbent into that complete service. *See* J.A. 551-54, 571-76 (¶¶ 292-297, 328-341); 47 C.F.R. § 51.315(b)-(f).

Incumbent carriers challenged both of those determinations in the Eighth Circuit. That court upheld the rule allowing entrants to obtain all the elements needed to

[29] Transcript, AT&T Investment Community Meeting (March 3, 1997) (comments of John Zeglis) (attached to Petition for Rehearing of GTE entities, *et al.* (8th Cir. No. 96-3321, filed Aug. 19, 1997)).

provide service, but only because it vacated the series of FCC rules allowing entrants to obtain all of those elements on a pre-combined basis. Pet. App. 53a-58a, 70a-71a. As we now explain, both sets of FCC rules are inconsistent with the text and structure of the 1996 Act.

3. The fundamental principle here is clear—Congress placed specific limitations on the use of resale, and those limitations must be respected. Accordingly, AT&T and MCI cannot obtain all the pre-combined elements necessary to provide service and pretend that they are anything other than resellers who should be subject to the statutory resale restrictions.

a. First, it is clear from the face of the 1996 Act that one of the fundamental distinctions between resale and the use of network elements is that, unlike finished services for resale, network elements are provided on an individual piece-by-piece basis. If a competitor wants to use multiple elements, the competitor itself must combine those elements.

In particular, the 1996 Act says in no uncertain terms that incumbents need only provide "access to network elements on an unbundled basis" and only in a "manner that allows *requesting carriers* to *combine such elements.*" 47 U.S.C. § 251(c)(3) (emphasis added). As the Eighth Circuit correctly stated (Pet. App. 70a), this language simply cannot "be read to levy a duty on the incumbent LECs to do the actual combining of elements." The incumbent must "provide elements in a manner that enables the competing carriers to combine them," but the "requesting carriers"—not the incumbent—are expected "to combine the unbundled elements themselves." *Id.* It is difficult to see how Congress could have been any clearer on that point.

The FCC's response to the plain language of section 251(c)(3) focuses on the word "unbundled." The agency contends that, in past orders, that word has referred

exclusively to charging separate prices for different services. FCC Br. 44. Accordingly, the FCC argues, as long as they are priced separately, network elements are still "unbundled" even if they are pre-combined by the incumbent into a complete, ready-to-use service.

As an initial matter, the FCC is wrong that, even in isolation, "separately priced" is the only reasonable, or even the most plausible, meaning of the word "unbundled." On the contrary, just last year, the Commission itself used the word "unbundle" as a synonym for "physically sever": "Although we conclude that shared transport is *physically severable* from switching, incumbent LECs may not *unbundle* switching and transport facilities that are already combined, except upon request by a requesting carrier." [30] The FCC's claim that "unbundled" has a single, predetermined meaning that contradicts the Eighth Circuit's conclusion is thus contrary to petitioners' *own* prior usage of that word.

In any event, like all statutory terms, the word "unbundled" must be understood in context. *See St. Vincent's Hosp.*, 502 U.S. at 221. Given that "requesting carriers" are to "combine such elements" under section 251(c)(3), the context here requires the conclusion that the Eighth Circuit reached. It is the responsibility of the requesting carrier physically to combine the various piece-parts that it receives from the incumbent in order to provide a finished telecommunications service. The

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[30] J.A. 1385 (Third Order on Reconsideration, ¶ 44) (emphasis added). *See also* J.A. 597-98 (¶ 384) ("[o]*ne way to unbundle* an individual loop" is "*to separate the unbundled loop(s)* prior to connecting the remaining loops to the switch") (emphasis added); Department of Justice Reply Comments, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 28 n.33 (FCC May 30, 1996) ("[i]n jurisdictions which have begun to open up local markets by requiring the *unbundling* of the local network into the loop . . ., local switching and interoffice transport elements, a variety of problems have developed in *separating* a customer's loop . . . from the local switch") (emphasis added).

incumbent itself has no obligation to combine those elements for its competitor. In this context, the unbundled network elements are not only separately priced, but also physically separate.

Significantly, even the FCC makes no attempt in this Court to resuscitate its now-vacated rules requiring incumbents to combine elements in new ways at a competitor's request. *See* 47 C.F.R. § 51.315(c)-(f). As the FCC apparently recognizes, there is no statutory anchor for any such duty. But neither is there any textual basis—in section 251(c)(3) or elsewhere—for requiring an incumbent to provide preassembled packages of elements for a competitor merely because the incumbent happens to have combined the elements for its own use.

Nor does the FCC gain anything by engaging in word games about the "rights" and "duties" created by section 251(c)(3). The FCC argues (FCC Br. 45) that the Eighth Circuit erred in concluding that an incumbent's "duty to provide" network elements under section 251(c)(3) "encompasses a *right* . . . to disconnect those elements." According to the FCC, since "a 'duty' is an obligation, not a right, . . . the grammatical implication of the Eighth Circuit's construction . . . is that incumbent LECs *must* provide access to network elements, including shared facilities, only on a *disconnected* basis." FCC Br. 45-46 (emphasis in original); *see* AT&T Br. 46.

That analysis simply misreads the Eighth Circuit's opinion. The court of appeals' understanding of section 251(c)(3) does not give incumbents any "rights"; it simply limits the *scope* of an incumbent's "duty" in accordance with the plain text of the statute. The incumbent's duty under the statute is to provide elements in a way that allows "requesting carrier[s]" to "combine" them—no more and no less.

The FCC also errs in contending that it would somehow constitute "discrimination" for an incumbent to provide network elements on a separated basis to new en-

trants when those elements are already combined in its own network. *See* FCC Br. 46. As an initial matter, any understanding of what constitutes "discrimination" under section 251(c)(3) must take account of the rest of section 251(c)(3). And it cannot be that Congress understood it to be "discriminatory" for an incumbent to do just what section 251(c)(3) expressly requires of it—provide network elements in a manner that allows a new entrant to combine them.

In any event, the FCC's argument rests on the false premise that incumbents, unlike entrants, are not required to combine network elements. *See* FCC Br. 46. Existing network element combinations do not materialize spontaneously out of nowhere. For a combination of facilities to exist, the incumbent must have invested the time and effort to combine the constituent elements. And where a new customer seeks local telephone service, the incumbent must create the connections needed to provide service to that customer, just as a new entrant would be required to do. Accordingly, MCI is wrong in stating that the vacated FCC rule "simply placed the potential competitor in the same position as the incumbent." MCI Br. 15. Just the opposite is true: the FCC's rule gave new entrants an artificial and unjustified advantage. By vacating the FCC's rule, the Eighth Circuit ensured that competitors and incumbents would bear the same burdens and that neither would have an inherent cost advantage or disadvantage.

Finally, there is no substance to the FCC's attempt to prove that network elements must be combined by focusing on the characteristics of one particular network element, a "signalling system." According to the FCC, it is not technically feasible to "disconnect[]" that element, so a new entrant could not be expected to undertake the work necessary to combine signaling with other network elements. FCC Br. 45. But the signaling system example supports our argument, not the FCC's. In particular, because a switch cannot be separated from the signaling

associated with it, the FCC's rules consider signaling and switching to be part of the *same* element for these purposes, *not* two inseparable elements. *See* 47 C.F.R. § 51.319(c)(1)(i)(C)(2). On the other hand, because signaling *can* be provided without switching, a competitor may obtain that item separately and, in that context, must obtain access to the incumbent's network to make a physical connection between the incumbent's signaling system and the competitor's own network. *See* J.A. —— (¶ 483) ("Carriers that provide their own switching facilities should be able to access the incumbent LEC's [signaling] network for each of their switches via a signaling link between their switch and the incumbent LEC's [network] . . . . This could be accomplished by the incumbent providing an unbundled signaling link from its [network] to the competitor's switch . . . .").

b. Even if we—and the Eighth Circuit—were wrong about the evident meaning of the statutory directive that incumbents are to provide elements in a manner that allows "requesting carriers to combine such elements," the statute still would not allow competitors to obtain a "platform" containing *all* the pre-combined elements necessary to provide service.

First, the language of the individual provisions governing network elements is clear that unbundled elements may be purchased only by a competitor with at least some network facilities of its own. Thus, section 251(c)(3) states—in language that MCI (MCI Br. 14-15) and the FCC (FCC Br. 43-44) conspicuously omit from their recitations of the statute—that the incumbent's duty is to provide "access" to network elements at a "technically feasible point." Those terms plainly contemplate a physical interconnection of networks that allows the new entrant to incorporate portions of the incumbent's network. *See* S. Rep. No. 104-23, at 20 (describing "unbundled access" as a form of physical access needed to ensure "the interoperability of *both carriers' networks*") (emphasis added). The reference to providing "access" at a "point"

makes clear that competitors will receive access at a physical place in the world. And that conclusion is further reinforced by the fact that the "point" of "access" must be "technically feasible," a restriction that makes sense *only* if the statute requires a new entrant to make a physical connection.[31]

Indeed, outside of litigation, the FCC itself has recognized that the statutory reference to "technical feasibility" necessarily assumes *physical* access to the incumbent's network: "We conclude that the term 'technically feasible' refers solely to technical or operational concerns. . . . We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." J.A. 507-08 (¶ 198).

The evident meaning of section 251(c)(3) is also strongly fortified by the language of related statutory provisions. In particular, under the 1996 Act, incumbents must permit "physical collocation"—that is, installation of a competitor's equipment on the incumbent's premises—"for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Congress would have had no need to require physical collocation for this pur-

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[31] Of all the petitioners, only AT&T even mentions this language. It argues that because the statute provides for access to "elements" at a single "point," Congress must have anticipated that elements would be provided in combination. AT&T Br. 38. But of course that argument does not dispute the basic point made in text that the entrant must have some sort of network to interconnect with the incumbent in order to obtain those elements. Thus, the entrant cannot simply buy all the elements from the incumbent; otherwise, there is no point at which two networks interconnect. As for AT&T's attempt to wring significance out of the plural "elements" and the singular "point" in that sentence, its theory doesn't work. An entrant can obtain multiple physically separated elements at a single point—typically, the "collocation cage" that it places in an incumbent's central office precisely to permit "access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6).

pose if, as the FCC asserts, entrants would never actually be required to enter onto the incumbent's premises to connect equipment.

This notion of a physical interconnection—a technically feasible point of access—between networks is fundamentally incompatible with a system that allows the new entrant to order from the incumbent everything it needs for a finished service. If the new entrant can order a complete "platform" of network elements, then it has no network to interconnect with that of the incumbent. The only connection between the new entrant and the incumbent is a phone call to order the platform.

Indeed, even under the FCC's own argument, access to all the pre-combined elements needed to provide service is not "unbundling." In the prior decisions on which the FCC has relied, the fundamental issue was whether one part of the network could be physically "unplugged" from the rest of the incumbent's facilities and separately priced so that other companies could compete to provide just that single piece of the network (for example, customer premises equipment or inside wiring). *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980); *Detariffing the Installation and Maintenance of Inside Wiring*, 59 Rad. Reg.2d 1143 (1986).

The "platform" approach sanctioned by the FCC turns that understanding of "unbundling" on its head. What is at issue in this case is *not* whether the network may be physically subdivided into separately priced parts so that competitors who have their own facilities (*e.g.*, their own customer premises equipment) may use those facilities to compete in the market for that network subpart. Rather, it is whether competitors who have no facilities of their own may pay a *single* price to obtain pre-combined packages of all the elements needed to reproduce the *complete* service the incumbent currently provides at retail. The FCC's prior decisions are thus directly contrary to the theory that access to such a preassembled platform may

be understood as "unbundling"—and, even more clearly, they do nothing to buttress the truly extraordinary claim, made by AT&T and MCI, that those companies may obtain all those pre-combined elements at rates that, when added together, are *below* the price at which, by statute, they may obtain the complete service.

In fact, contrary to the FCC's new-found theory, access to pre-assembled platforms has always been understood to be just what it is—resale. And that brings us to our last key point.

Congress enacted specific limitations on the use of resale, and the Commission cannot allow those restrictions to be evaded by entrants engaging in the exact equivalent of resale under another name. "[A] statute is to be considered in all its parts" (*Lexecon Inc. v. Milberg Weiss Bershad Hines & Lerach*, 118 S. Ct. 956, 962 (1998)), and a conclusion that renders important statutory limitations meaningless cannot stand. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (relying on the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (rejecting an interpretation that "emasculate[s] an entire section" of a statute) (internal quotation marks omitted). Thus, the FCC's attempt to allow competitors to construct an entire fictional network under the guise of purchasing unbundled network elements is contrary not only to the language of the specific provisions governing unbundling, but also to the basic statutory distinction between resale and access to unbundled network elements. As one facilities-based competitor has explained, "the careful balance crafted by Congress would be upset . . . if local entrants could undermine the comprehensive scheme of the Act by manipulating the provisions of Sections 251(c)(3) and 252(d)(1) to acquire complete services as platforms of network elements, and to have those services priced at cost rather than at wholesale rates as required by Sections

251(c)(4) and 252(d)(3)."[82] This view was echoed by a group of the key legislators who actually wrote the 1996 Act.[83]

For these reasons, this fundamental flaw in the FCC's rules cannot be brushed aside as a mere "policy concern." FCC Br. 47. The problem with the FCC's position is not simply that it is inconsistent with what the agency *concedes* are important statutory policies, such as encouraging facilities-based competition—though that is assuredly a significant problem. It is also, and more fundamentally, that the FCC's conclusion is inconsistent with the separate statutory treatment accorded resale and unbundling.

Our argument, therefore, is *not* that, as a matter of policy, the FCC should artificially make the use of unbundled elements a "less attractive entry option." FCC Br. 47. Rather, we contend that the FCC's rules must make the use of both resale and unbundled elements *only as attractive as Congress intended them to be.* And the FCC has no discretion at all to promulgate rules that disregard the limitations that the 1996 Act imposes on those entry vehicles; such rules are fundamentally inconsistent with the scheme Congress enacted into law. *See, e.g., Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (declining to defer to agency interpretation that was "flatly inconsistent with the statutory scheme as a whole"); *Dole v. United Steelworkers*, 494 U.S. 26, 41 (1990) (agency interpretation rejected "in light of language and structure of the Act as a whole").

In fact, the FCC itself has recognized that a reading of the statute that makes the use of unbundled elements interchangeable with resale—and thus nullifies the statutory resale restrictions—is insupportable. Accordingly, it has attempted to show that there is some real difference between resale and access to *all* the pre-combined network

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[82] Time Warner Communications Mem. in Support of Petitions for Rehearing, at 3 (8th Cir. No. 96-3321, filed Oct. 1, 1997).

[83] *See* Brief of Amici Curiae the Honorable John D. Dingell, *et al.*, at 12-18 (8th Cir. No. 96-3321, filed Nov. 15, 1996).

elements needed to provide a service. In its First Report and Order, the Commission asserted that a carrier using unbundled elements confronts unique competitive perils. Unlike a reseller, such a carrier allegedly must make an up-front investment and thus "faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its costs." J.A. 573-74 (¶ 334); *see also* FCC Br. 47.

That is simply wrong. Under the FCC's own view of the 1996 Act, competitors are *not* required to make any up-front investment. Generally speaking, local telephone networks can be divided into three segments: (1) the local loop, which connects an individual customer to a central telephone switch; (2) the switch, which directs calls to their destination; and (3) the trunk connections between switching centers (and thus their associated loops), which transport calls that originate and terminate in areas served by different switches. With respect to switching and trunks, the FCC has squarely held that competitors may order whatever quantities they need to meet customer demand, even if that requires shared use of particular facilities.[34] According to the Commission, a competitor may demand that the incumbent's switch and transport facilities be "*priced on an actual usage basis*"— in other words, the competitor need make no up-front investment and need bear no risk of demand fluctuations.[35] Similarly, a competitor need make no up-front investment in loops, which are purchased individually when a customer switches providers.[36]

The FCC argued before the court of appeals that, even if considerations of investment risk would not lead a competitor to choose resale over unbundled elements, a competitor might do so with respect to some customers for

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[34] *See* J.A. 1384-85 (Third Order on Reconsideration, ¶¶ 43-44).

[35] Response of Federal Respondents to Petitions for Rehearing, at 12 (8th Cir. No. 96-3321, filed Oct. 1, 1997) (emphasis added).

[36] *Id.* at 13.

whom the State has set retail rates at artificially low levels to promote universal service. FCC Rehearing Response, *supra* note 35, at 13. The FCC explained that, when retail rates are low relative to costs, "the 'retail less avoided cost' standard of section 252(d)(3) will allow a new entrant to compete via resale, while access to unbundled elements at rates 'based on the cost' of those elements likely will not." *Id.*

But that, of course, is precisely the point. The FCC's rules would allow new entrants to engage in regulatory arbitrage—invoking the resale pricing rules when those are advantageous, and the network element rules when those are advantageous—without any substantive difference in the service provided, the work done, or the new entrant's up-front investment. The fact that the resale provisions of section 251(c)(4) provide a more favorable path for potential competitors in some instances does not justify creating a new extra-statutory pricing regime to address other situations in which end-to-end use of network elements is more expedient.

4. The FCC and its supporting petitioners ultimately seek shelter in policy arguments of their own. AT&T argues, for instance, that preassembled "combinations of network elements . . . are particularly critical for providing competition for residential service" and that "the Eighth Circuit's decision . . . 'effectively has killed off local competition' in much of the local market." AT&T Br. 37 (internal citation omitted).

All the Eighth Circuit has "killed off," however, is the ability of companies to do something Congress never intended—make a quick buck by gaming the regulatory system without investing in any facilities and without supporting universal service. The Eighth Circuit has done nothing to hinder competition by companies that seek to engage in real facilities-based competition.[37] For that rea-

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[37] Nor has it done anything to prevent resale by companies that do not object to following the rules that Congress enacted into law. Indeed, the FCC's Chairman recently emphasized that resale is

son, many of those companies have cheered the Eighth Circuit's ruling. As one competitor stated, the Eighth Circuit "made the right decision": those demanding that incumbents provide fully preassembled sets of network elements are part of a "rear-guard action being fought by the big long distance carriers to essentially get in there and not have to make any investment."[38] Another facilities-based competitor echoed the point: true local competitors "owe[] a debt of gratitude to the Eighth Circuit. . . . The fact that there will be no free ride for interexchange carriers seeking a cheap method of local market entry is a plus for our industry."[39] Those competitors have also made clear that the result advocated by the FCC in this case would undermine facilities-based competition because "[i]f a competing carrier can obtain an entire platform at incremental cost that effectively replaces a tariffed service, it will have no incentive to invest in deploying its own facilities in the local network."[40]

By the same token, AT&T's and MCI's overheated rhetoric about incumbents gratuitously "ripping apart" their own networks is at best disingenuous. The 1996 Act itself requires incumbents to separate their networks into piece-parts so that new entrants may obtain access to those

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"economically viable." *Kennard Targets Phone, Cable Competition in 'Very Ambitious' Agenda*, Communications Daily (Feb. 2, 1998). *See also* Krause, *Computers & Technology: Kennard's Call Is Implementing Telecom Reform*, Investor's Business Daily (Feb. 18, 1998) ("Yes, I'm aware that the large (long-distance carriers) have backed away from a resale strategy. But some smaller CLECs (competitive local exchange carriers) haven't backed away from resale, and it seems to be viable for some new entrants") (statement of Chairman Kennard).

[38] *CLECs Revenue and Market Share Predicted to Grow 60% Next Year*, Communications Daily, at 2 (Dec. 10, 1997) (quoting Royce Holland, Chairman of Allegiance Telecom).

[39] Telecommunications Reports, at 18 (Nov. 10, 1997) (quoting James Allen, CEO of Brooks Fiber Properties, Inc.).

[40] Reply Comments of Intermedia Communications, Case No. 97-C-1963, at 5 (N.Y. P.S.C. Dec. 12, 1997).

parts. But, ever since Congress passed the 1996 Act, AT&T and MCI have sought at every turn to transform that straightforward statutory requirement into something it plainly is not—a duty to provide access to complete finished services. It should be no surprise that such an attempt to misuse the statutory scheme has run into significant difficulties that derive directly from the text of the 1996 Act itself. Nor is there anything improper about the incumbents' insisting upon strict adherence to that statutory text to forestall massive losses resulting not from genuine competition, but from illegitimate regulatory arbitrage.

B. The FCC's View of the Network Elements That Incumbents Must Make Available Is Contrary to the Act's Language, Structure, and Policy.

Having allowed new entrants to use an incumbent's network elements in a way that Congress never intended, the FCC then compounded the problem by expanding the number of such elements that incumbents must provide. The Commission did so in several ways, none of which is consistent with the 1996 Act.

1. First, the FCC nullified the statutory directive that, in determining what elements an incumbent must make available, the FCC "shall consider, at a minimum," whether access to proprietary network elements is "necessary," and whether the failure to provide access to other network elements would "impair" the ability of the requesting carriers to provide service. 47 U.S.C. § 251(d)(2). That provision reflects Congress's recognition that access to an unbundled network element is economically justified only when a new entrant has a genuine need for such an element. As AT&T itself explained in its opening brief, the effect of these provisions was to "allow new entrants to obtain *essential facilities* that a LEC controls." AT&T Br. 2 (emphasis added).

The FCC disregarded Congress's direction. The Commission determined that the "necessary" and "impair" standards required no consideration of "whether a request-

ing carrier could obtain the desired elements from an alternative source"; the only proper inquiry, in the FCC's view, is whether the equivalent functionality can be obtained elsewhere in *the incumbent's own network*. *See* J.A. 547, 549 (¶¶ 283, 287). In other words, the only situation in which a new entrant is *not* entitled to an incumbent's network element is when *some other* element in the incumbent's network can perform the same function. *See id.*

That astonishing conclusion defies the plain meaning of the 1996 Act. Access to a proprietary element from an incumbent simply cannot be "necessary," and failure to provide an element cannot "impair" a new entrant's ability to provide service, if an equivalent element is readily available from a source other than the incumbent. Yet, under the blinkered inquiry required by the FCC's rules, a particular facility may be available from dozens of suppliers at competitive prices, but access may nevertheless be deemed "necessary" for an entrant to provide service.

That is an irrational result, and it is not the one Congress enacted into law. On the contrary, as noted above, by mandating an evaluation of the actual need for an element—under the necessity and impairment standards—Congress expressed its preference that new entrants rely on non-incumbent facilities where possible, in order to promote facilities-based competition and encourage innovation. After all, it is precisely where the new entrant can avail itself of facilities other than the incumbent's that the potential for true facilities-based competition is greatest. And, contrary to the Eighth Circuit's apparent belief, that does not mean that access to elements is not required whenever an "element[] could theoretically be duplicated eventually." Pet. App. 47a-48a. It simply means that *some* inquiry into actual market conditions should be made before the incumbent is conscripted into providing its competitors with access to its network equipment.

Indeed, it is hornbook antitrust law that "essential facilities" must be made available to competitors only if they are not *"available from another source or capable of being duplicated by the* [*competitor*] *or others."* 3A Areeda &

Hovenkamp, ¶ 773b, at 202 (1996) (emphasis added). The lower courts have repeatedly held that a prerequisite for access to an essential facility is a showing of the "competitor's inability practically or reasonably to duplicate" that facility. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).[41] The reason for that rule is straightforward, and it is fully applicable here. When the government "order[s] the [owner] to provide the facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether." 3A Areeda & Hovenkamp, ¶ 771b, at 175. To protect against precisely that danger, Congress required an inquiry into "necessity" and "impairment" before the FCC could force incumbents to offer access to their network elements. By ignoring those statutory standards, the FCC created the very result—loss of any incentive to build facilities—that courts have scrupulously guarded against in antitrust cases.

The FCC's rule is particularly troublesome in the context of proprietary elements. Congress required the Commission to apply strict standards to the unbundling of such elements because it understood that no incumbent will invest in research and development if innovations must automatically be turned over to the incumbent's competitors. *See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) (right of exclusivity provides "an incentive to inventors to risk the often enormous costs in terms of time, research, and development"). But, under the FCC's rules, an incumbent can be required, after investing millions of dollars in developing a new service or feature, to turn that service or feature over to its competitors at

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[41] *Accord Twin Labs, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Laurel Sand & Gravel, Inc. v. CSX Trans., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Anaheim v. Southern Calif. Edison Co.*, 955 F.2d 1373, 1379-80 (9th Cir. 1992).

forward-looking cost regardless of whether those competitors can obtain its equivalent elsewhere. That rule will quite obviously provide a significant disincentive to research and development by incumbents. Indeed, the FCC has admitted as much. See J.A. 546-47 (¶ 282) ("prohibiting incumbents from refusing access to proprietary elements could reduce their incentives to offer innovative services"). That result cannot be squared with the statutory text, and it should be reversed.

2. Having created a rule under which competitors are entitled to obtain just about anything deemed to be a "network element," the FCC then construed the term "network element" to encompass virtually every asset an incumbent owns. As a result, the FCC's unbundling rules require an incumbent to turn over to competitors essentially its entire business.

The Act defines a network element as a "*facility or equipment* used in the provision of a telecommunications service," as well as "features, functions, and capabilities that are provided *by means of such facility or equipment*, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). Thus, the concept of network elements under the Act is rooted in discrete *physical* facilities carriers use in providing local exchange service and "features" that may be made available "by means of" such facilities.

The Act's definition of a "network element" therefore reflects the basic purpose of the unbundling provisions—to give entrants access to those essential physical facilities they need to provide telecommunications service but could not reasonably duplicate, at least in the short term. At the same time, the term "network element" does not encompass aspects of an incumbent's business that Congress had no reason to believe could not be duplicated, such as back-office billing or other support functions that any new competitor could reasonably perform for itself.

The FCC, however, defined "network element" so broadly that it effectively permits competitors to make use of every part—both physical and non-physical—of an incumbent's business. Several such rulings are at issue here.

a. First, the FCC's order requires incumbent carriers to unbundle their operational support systems (or "OSS"). 47 C.F.R. § 51.319(f). These support systems consist of computer software that serves a number of functions relating to an incumbent's customer service operations, such as processing customer orders and routing customer requests to the right person in the company.

These systems are not "network elements" within the meaning of the statute. They are neither "a facility or equipment" used in the provision of "a telecommunications service"—that is, used in the "routing" or "transmission" of telephone calls—nor "features . . . provided *by means of* such facility or equipment." 47 U.S.C. § 153(29), (43), (46) (emphasis added). Rather, as their name suggests, they are *support* systems that an incumbent uses to run its business—to process orders, to dispatch repair personnel, to keep track of customer service requests. Requiring an incumbent to make these systems available to competitors has nothing to do with unbundling the pieces of the network actually used to deliver calls. As a result, the plain terms of the definition in the Act simply do not reach these software systems.

Indeed, the FCC does not even attempt to characterize these support systems as part of the equipment used to route or transmit a call. Rather, the FCC has made clear that its objective in unbundling support systems is to ensure that new entrants will be able to perform *business* functions such as "pre-ordering, ordering, . . . and billing" and "basic service functions [such] as scheduling customer appointments" in "substantially the same time and manner that an incumbent can for itself." J.A. 670-71 (¶ 518). But nothing in Congress's definition of network elements suggests that the incumbents' business skills, in contrast to portions of their physical networks, must be turned over to competitors. On the contrary, Congress specifically tied

the unbundling requirement to the physical "features and equipment" owned by the incumbent.

Nor can incumbents be required to provide these back-office support systems on the Eighth Circuit's theory that, since a "telecommunications service" is the "offering of telecommunications for a fee directly to the public" (47 U.S.C. § 153(46)), a facility is "used" in providing a "telecommunications service" any time it assists in the overall "commercial offering of telecommunications." Pet. App. 42a-43a. Under that principle, *any* asset that might be useful in running a telecommunications company—desks, repair trucks, office space—could be requisitioned by a competitor. But no one has seriously suggested that Congress intended any such result. And the statute's definition of "telecommunications"—which encompasses only the *physical* "transmission, between or among points specified by the user, of information of the user's choosing" (47 U.S.C. § 153(43))—is incompatible with the Eighth Circuit's expansive theory. Operational support systems—like desks, trucks, and office space—having nothing to do with the transmission of calls, and they therefore cannot qualify as "network elements" under any reasonable reading of the statutory terms.

b. The FCC also erred in deciding that *services* offered by incumbent LECs, such as operator services and directory assistance, should be treated as "elements" subject to unbundling. *See* J.A. 678-81 (¶¶ 534-540); 47 C.F.R. § 51.319(g). These services do not fall within the definition of "network elements": they are not a "facility or equipment" in the telephone transmission network; neither are they "features, functions, [or] capabilities . . . provided by means of" such facilities. 47 U.S.C. § 153(29). In fact, although the unbundling provision of the House bill originally applied to "*services*, elements, features, functions, and capabilities," the Conference Committee chose to eliminate the term "services" when it defined the scope of unbundling. H.R. 1555, § 242(a)(2) (emphasis added). The FCC improperly reversed Congress's decision in favor of its own policy preferences.

Straining to find a textual hook for its illegitimate stretching of the term "network element," the FCC asserted that operator services and directory assistance qualify as "*information* . . . used in the transmission, routing, or *other provision* of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). According to the Commission, the concluding phrase "other provision" expands the category of network elements to include any information related to the provision of telecommunications services. J.A. 537-38 (¶ 261).

Under established principles, however, that phrase must be understood in light of the company it keeps. When a general term such as "other provision" is tacked on at the end of a list, it is properly understood as limited by the more specific terms that precede it. *See, e.g., Hughey v. United States*, 495 U.S. 411, 419 (1990) ("general statutory term should be understood in light of the specific terms that surround it"); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("catchall provision" is to be "read as bringing within a statute categories similar in type to those specifically enumerated"). Here, the other elements of the list—"transmission" and "routing"—are functions used in the physical delivery of calls, and nothing in the statute suggests that the reference to "other provision" should expand that definition so broadly that it includes essentially all assets owned by a company that provides telephone service.

The full absurdity of the Commission's theory is illustrated by its insistence that even such optional, discretionary services as Caller ID and Call Waiting must be treated as "network elements." All parties agree that these so-called "vertical services" are retail services that incumbents currently sell to their customers and that therefore must be made available at the statutory wholesale discount. But under the FCC's rules, new entrants may *also* obtain access to these same vertical services as network elements at cost-based rates—and may do so despite the incontestable fact that these services do not route, transmit, or oth-

erwise play a role in the physical delivery of a telephone call.

Congress had no reason to require incumbents to make the same service available at two different prices, and it did not do so. Indeed, adherence to the statutory resale rules is particularly important in the context of these services because, as with business services, State commissions typically set retail prices for vertical services at above-cost rates to support low prices for other services. Allowing competitors to obtain the same services at the cost-based rates reserved for true network elements would simply invite them to engage in yet another form of regulatory arbitrage. Congress intended no such result—indeed, as noted, it affirmatively decided to exclude "services" from the definition of network elements. And because an asset can qualify as a network element only if it is "*used* in the provision of a telecommunications service," it makes no sense at all to say that a telecommunications service is *itself* a network element.

III. THE FCC'S "PICK-AND-CHOOSE" RULE IS INCOMPATIBLE WITH THE ACT'S SCHEME OF PRIVATE NEGOTIATIONS AND BINDING AGREEMENTS.

The FCC's order precludes effective negotiation of binding agreements by allowing new entrants "to choose among individual provisions contained in publicly filed interconnection agreements" that the incumbent carriers have reached with other carriers. J.A. 1044-45 (¶ 1310). Competitors may poach "any individual interconnection, service, or network element arrangement contained in any agreement to which [the incumbent] is a party." 47 C.F.R. § 51.809(a) (emphasis added). Moreover, the competitor need not enter into renegotiations that would give the incumbent a chance to rebalance the relationship to take account of the terms imported from other agreements. Rather, the order lets the competitor bypass the statutory negotiations *entirely* and demand that a State regulator award it any term agreed to by others. J.A. 1048 (¶ 1321). In effect, the FCC transformed a negotiated agreement into a series of tariff provisions from which competitors

can pick and choose at will. The Eighth Circuit correctly set this rule aside as incompatible with the statutory structure.

Section 252(i), on which the FCC relies, requires nothing remotely like this bizarre rule. It provides only that an incumbent LEC "shall make available" in the negotiating process "any interconnection, service, or network element" that it provides under an approved agreement with any other carrier "*upon the same terms and conditions* as those provided in the agreement." 47 U.S.C. § 252(i) (emphasis added). This provision establishes a straightforward nondiscrimination principle that requires an incumbent LEC to put on the bargaining table for negotiation any item contained in another agreement, but *only* on the same terms and conditions—embodying all the same tradeoffs—that appear in that other agreement. This requirement ensures that a LEC cannot restrict a particular service to a specific carrier and that a second entrant can step into the shoes of an earlier one if it wishes to accept the deal that the earlier one has struck. It certainly does *not* mean that a second entrant can take what it likes from a prior agreement and leave behind what it doesn't like.[42]

Moreover, any agreements that *are* concluded under the FCC's "pick-and-choose" rule are not binding. A competitor may demand for itself a new term from another agreement at *any* time, even after it has already signed a contract with an incumbent agreeing to a full package of terms and conditions. *See* J.A. 1046-47 (¶ 1316). As this Court has recognized, a contract that gives one party unfettered discretion " 'to deny or change the effect of the promise[] is an absurdity.' " *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 n.23 (1977) (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

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[42] The FCC's suggestion that this reading of the statute would encourage incumbents to lard an interconnection agreement with unrelated terms (FCC Br. 49-50) ignores the fact that any agreement must be approved by a State commission. 47 U.S.C. § 252(e). State commissions are amply equipped to reject any attempt to import such unrelated terms into an agreement.

The FCC's radical pick-and-choose regulation cannot be reconciled with a statutory scheme that relies on bilateral commercial negotiations to establish "binding agreement[s]." 47 U.S.C. § 252(a)(1). Bargaining is impossible where one party remains free to avoid its promises by selecting new contract terms at will, and where the other party cannot know the extent of its commitments because it cannot know who else in the future will demand the concessions it makes in a contract without agreeing to the same tradeoffs.

Pick-and-choose also distorts the *content* of interconnection arrangements. A complex commercial agreement is an integrated whole whose terms reflect the give and take of bargaining. Generally, each party makes concessions in some areas in exchange for benefits in others, reflecting the particular needs and priorities of the parties. A party might, for example, agree to a higher price for one service in exchange for a lower price for another. But pick-and-choose allows one side (the entrant) to demand the *quid* (the lower price on the first service) without having to take the *quo* (the higher price on the other) with which it was originally paired—regardless of differences in context or in the commercial assumptions on which each bilateral arrangement is based. Given this prospect, the incumbent simply cannot afford to make tradeoffs, and a negotiated agreement that would otherwise benefit the negotiating parties will not be reached.[43]

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[43] AT&T suggests that the FCC rule does not permit a competitor to take the *quid* without the *quo* where the tradeoff is "legitimate" and "express[]." AT&T Br. 50. But the FCC has never defended its rule on this ground. Moreover, that interpretation ignores the reality that complex commercial agreements involving multiple services must be viewed as a whole—one party may accept a tradeoff that it believes to be somewhat disadvantageous because another tradeoff embodied in the agreement is particularly advantageous. And forcing an incumbent to disclose this type of detailed analysis during negotiations in order to be able to prove later that particular terms were "expressly" linked and that such a link is "legitimate" would have its own chilling effect on negotiations.

In short, the FCC's pick-and-choose rule conflicts with the terms and structure of the Act and impermissibly thwarts the statute's reliance on negotiated, binding agreements. This Court should affirm the Eighth Circuit's decision to vacate the rule as unlawful.

CONCLUSION

Both judgments of the court of appeals should be affirmed insofar as they vacate the rules and order paragraphs specified in the court's opinions. *See* Pet. App. 66a & n.39, 71a-72a, 91a. The judgment of the court of appeals in the lead case below should be reversed insofar as it upheld the FCC's rules (1) permitting competitors to lease all of an incumbent's network elements needed to replicate a service provided by the incumbent; (2) nullifying the statute's "necessary" and "impair" standards; and (3) impermissibly expanding the definition of "network elements" to include operations support systems, operator services, directory assistance, and "vertical services."

Respectfully submitted,

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